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No. 16102 ✓

VOL. 3088

United States
Court of Appeals
for the Ninth Circuit

See ALSO 307

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839, and INTERNA-
TIONAL UNION OF OPERATING EN-
GINEERS, LOCAL No. 370,

Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a
Corporation,

Appellee.

Transcript of Record

In Three Volumes

Volume II

(Pages 379 to 768)

FILED

DEC 12 1958

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division.

No. 16102

United States
Court of Appeals
for the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
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Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division.

SAM C. GUESS

having previously been duly sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Etter:

Q. Mr. Guess, in 1955, without trying to be absolutely accurate, let's say, can you tell me how many contractor members belonged to the Associated General Contractors? A. Fifty.

Q. Beg your pardon?

A. Approximately 50.

Q. 50. Can you tell me whether or not those 50 contractors were parties to the A.G.C. contract which has been introduced? I can't recall the exhibit number, because I understand the exhibits aren't available in the absence of the key at the present time, but anyway to identify it, I have reference to the exhibit which I submitted, it being a contract extending from 1950 to December of 1955, if you have it. Having reference to that contract, during that period of time, would there have been about 50 members, could you say generally?

A. Between—actually, between 45 and 55. It varied. Sometimes at the end of the year, you made a slice-off of [499] people that were moved and you clean your records out, it might drop to 45, and during the year would build up to 55, so 45 to 55 and 50 would be an average.

Q. Would be a fair average for those 5 years?

A. Right.

(Testimony of Sam C. Guess.)

Q. Now, the contracts which are here sued upon, and which I believe are in the record as Exhibits No. 2 and 3, as I recall, without picking them up, the A.G.C. executed those contracts, that is, the A.G.C. through you, I believe, Mr. Guess, or some authorized agent? A. Right.

Q. Isn't that correct? A. That is correct.

Q. And you signed on behalf, I would assume, of all of your member contractors?

A. Correct, sir.

Q. That is so, is it not?

A. That is right.

Q. Can you tell me whether any of the 45 or 50 contractors whom you represented at the time Exhibits 2 and 3 were entered into and signed, also signed separate contract agreements with the unions indicated and designated in those two exhibits as signatory parties?

A. I don't believe that any of my contractors would sign a separate and distinct agreement, Mr. Etter, not to my [500] knowledge.

Q. I see. A. I might add this——

Q. Yes?

A. ——that I understand, and I think I stated yesterday, that sometime during 1955 the J. A. Jones Company applied to and was received as a member of the Spokane Chapter.

Q. I understand that.

A. And I understand had become a party prior to their joining the A.G.C., had become a member of the Negotiating Committee down at Hanford.

(Testimony of Sam C. Guess.)

Now, that is my understanding, it is not completely factual.

Q. Now, in March of 1956, I think you told me that you represented, that is, the A.G.C. Chapter, represented two of the contractors who were then involved in performing work under A.E.C. contracts at the Hanford Works Project, to wit, J. A. Jones and plaintiff here, Morrison-Knudsen?

A. That is correct.

Q. That is correct. And at that time, am I correct in assuming that you did not represent any of the other contractors that had A.E.C. construction work in the Hanford Works Area?

A. That is correct. [501]

Q. That is correct. Can you tell me whether or not on or about the 8th day of March of 1956, in your bargaining that you were carrying on with your unions, you accepted an assignment of the bargaining rights of the Hanford contractors?

A. Mr. Etter, I received a copy of a letter, or at least I received a letter, from Mr. Kenneth McCaffree, the assistant—or the Executive Secretary of the Hanford Negotiating Committee, which informed me that he—or that the contractors down at Hanford were assigning us their bargaining rights in accordance with the membership in which they held up here. In fact, when I received the paper, I was completely flabbergasted, because I already had the bargaining rights of those two people, I didn't see how he could transfer to me bargaining rights that I already had, and neither could

(Testimony of Sam C. Guess.)

he transfer to me any bargaining rights of the contractors who were not members of the Association. It is impossible of accomplishment because somebody has got to subscribe to the ethical code and the bylaws of the A.G.C. in order for me to represent them and, therefore, that paper, as far as I was concerned, was an ambiguity in the grossest sense.

Q. Well, then, as I understand it, you were of the opinion first that he could not assign the bargaining rights of [502] two of your people who were members, that is, J. A. Jones and Morrison-Knudsen, because you had already assumed and acted for them as a bargaining agent?

A. I was already acting for them.

Q. Number 2, you could not assume to bargain for the other contractors down there for the reason that, not being members of your organization and not having subscribed to what the requirements might have been, the ethical practices and otherwise, you were in no position, by virtue of the rules and regulations of your organization, to represent them? A. That is correct, sir.

Q. Is that correct? A. That is correct.

Q. Did you so advise Mr. McCaffree?

A. I am not sure, I did not make a transcription or any letter. I think that I discussed the thing over the telephone, to my memory, but as far as writing the letter, I did not do so.

Q. Did you on the 8th day of March during negotiations with the various unions, including the representatives of defendants here, advise them that

(Testimony of Sam C. Guess.)

you had received this letter from McCaffree assigning to you these particular bargaining rights?

A. Mr. Etter, it was on the morning of March the 10th at [503] 10 a.m. that we began a conference with those various unions concerning that letter——

Q. Oh, yes.

A. ——and concerning the letter and conditions of Hanford.

Q. Was it, though, on that morning of the 10th that you advised the unions, including the Engineers and Teamsters, that you had received such a communication and that you were bargaining on behalf of Hanford?

A. The chairman of the Spokane Labor Committee, Mr. Maxwell Sather, opened the negotiations that morning by requesting a statement from each of the parties as to their respective positions regarding the situation at Hanford. Mr. McCaffree summarized the position of the Hanford Contractors Committee, commenting that the consummation of the project agreement in October of 1952 and through the demands of the several unions to terminate such agreements in 1955 and ended with the action of the committee in terminating the project agreement and signing of area association agreements with various unions.

Mr. Rossman then made a statement in which he concurred in Mr. McCaffree's summary of the facts. The qualification of the facts remained that the

(Testimony of Sam C. Guess.)

members of his local union employed on the Hanford Project could not reconcile themselves into taking the cut in take-home [504] pay which would result in immediate transition to the A.G.C. area agreements.

Now, as to actually giving you a specific yes or no question, we went something like—we talked about this proposition, Mr. Etter, until 4 p.m. and so many, many things were said that day, and I could go ahead and read you the entire transcript of the conversation which I made at the time, if you so desire.

Q. No, without going into all of that, I wonder if, examining the minutes, there is anything there that indicates that you advised sometime during these proceedings that you were acting under an assignment of bargaining rights made to you through Mr. McCaffree in your negotiations?

A. No, sir, we didn't state that we were making any negotiations by any assignment of Mr. McCaffree.

Q. Do you recall, Mr. Guess, that I showed you a copy of a contract proposal——

Mr. Etter: We haven't got those yet?

The Clerk: I'm sorry, I can't get the key.

The Witness: I have a copy of it, Mr. Etter.

Q. (By Mr. Etter): Have you really there?

A. May I make an admission of mistake in reading yesterday to you?

Q. Yes. [505]

A. When I read you the proposal that we made

(Testimony of Sam C. Guess.)

to them, I read you a proposal that was arrived at tentatively in caucus, the complete embodiment of which did not occur in this agreement that you showed me on that sheet. That was a boil-down after conferences and working the thing out, and so the proposal that we made to them was as you gave it to us yesterday, of which the copy is right here, and I think I have an extra. This is an extra copy of it, if you would like it.

Q. Now, referring now to that exhibit, whatever number it might be, and accepting Mr. Guess' statement that this is a copy of it and substituting now this for the exhibit while I am inquiring here——

A. Right.

Q. ——you have the words: "Effective March 12, 1956, the provisions of the A.G.C. agreements will apply on the Hanford Project on all A.E.C. contracts, with the following exceptions * * *"

I was reading here from the proposal.

A. Yes, uh-huh.

The Court: What is the date of this?

A. March 10th.

Mr. DeGarmo: This is the 10th, the proposal was made the 10th of March, and I think it was made effective March the 12th. Is that correct, Mr. Guess? [506]

A. That is correct. Now, at that same time, Mr. Etter, we made the proposition to the people, and we actually did take it into effect, that we continue the isolation pay and the bus pay, bus transportation, until March the 19th, and we thought that in

(Testimony of Sam C. Guess.)

that intervening time that we could get this ironed out and mutually agreeable, and one of our strongest members and one of the members of our negotiating committee who has the effect—I mean, has the respect and the co-operation of all the labor people involved, Mr. Dewey Murrow, made a very earnest pleading that we go into this thing to try to amicably settle the proposition so that no one would get hurt, and it was at this deal we were considering the hardship case.

Q. (By Mr. Etter): Now, of course, your proposal speaks of proposing to apply those terms you have to the A.G.C. agreement, isn't that the language?

A. This was going to be an amendment to the A.G.C. agreement.

Q. Yes. Well, you recognized at that time that the unions that you were talking to were still working under an extension, if you can call it that, or still working under the same terms of the agreement with the contracting committee at Hanford that had existed on December the 31st of '55?

A. They were working, Mr. Etter, in a complete and total [507] vacuum in a situation in which we had been very reluctant to do anything overt to prevent the work stoppage on the Project, and we knew and had been told that if we were to make a change in the status quo at the Project, that trouble would result, and so we were continuing in order to try to reach an amicable settlement of the situation.

(Testimony of Sam C. Guess.)

Q. Well, what I am saying, though, is under the notice which Mr. McCaffree had sent on the 29th of December, he had said that they would continue working under the same conditions as at the time of the termination, did he not?

A. He said that.

Q. He said that, that the contractors would continue that, and the contractors and the unions did continue that, did they not, and were continuing it when you were talking with them?

A. Yes, sir, they were continuing it when we were talking to them.

Q. They were continuing. And you did not claim then or had not claimed, had you, with any of these defendants that they were governed by an A.G.C. contract?

A. There was no agreement in effect since the cancellation of the existing Hanford agreement, and we had assumed that a cancellation and a termination of a contract in [508] an area either left a void there or our contract, the existing contract. We had the only then legally constituted contract and it was our opinion that that was to go into effect.

Q. Well, you knew on the 24th of December and the 19th of December, when you signed contracts with the Teamsters and with the Engineers, these two locals that are defendants, you knew then, did you not, that this void was going to be created on the 29th of December—on the 31st day of December—even though there were at that time

(Testimony of Sam C. Guess.)

employees of both Unions working for Morrison-Knudsen working on the Project?

A. We did not know that, Mr. Etter.

Q. Beg your pardon?

A. We did not know that there was going to be a void on that date. We didn't know at the time we signed our agreements, we didn't know what exactly the termination or the cut-off date of the Hanford Agreement was going to be.

Q. Well, then, Mr. Guess, assuming that the Hanford Agreement, if the termination, the void, had not commenced until April of 1956, inasmuch as you have said you didn't know until April of 1956, would you say that your contract, regardless of that, became effective January the 1st as to the same parties? [509]

A. That is an assumption that I just don't know the ramifications of.

Mr. DeGarmo: I think he is asking the witness to draw a legal conclusion.

Mr. Etter: Well, I don't think so.

The Court: I am not sure that I got the question correctly.

(Question read.)

Mr. DeGarmo: Now, just a minute, I have an objection to that question upon the ground that it assumes a fact which is contrary to fact and, therefore, it is asking the witness to speculate upon an issue that is not before the Court.

(Testimony of Sam C. Guess.)

The Court: I will sustain the objection.

Q. (By Mr. Etter): Let's put it this way: When you signed these contracts on the 19th and 24th of December without knowing whether or not or when there would be any termination of the Hanford Agreements, did you intend your contract to be effective January the 1st regardless of termination or otherwise?

A. We intended that our contract, and it was in effect, Mr. Etter, on January 1st and we had so stated on numerous occasions to the unions, that if in the event of a termination of an area agreement and any hardships were to come up, that we would sit down and negotiate [510] hardships with them immediately to come to some agreeable and amicable settlement of the hardship conditions.

Q. Now, Mr. Guess, I would like to direct your attention to a meeting on the 3rd day of November of 1955, at 10:05 a.m.—

Mr. DeGarmo: What was that date?

Mr. Etter: The 3rd day of November.

A. Yes, sir.

Q. Present for the A.G.C. were Sam Guess, Frank Winslow, Max Sather, Neil Dagerstrom, and Dewey Murrow, is that correct?

A. That is correct.

Q. And present for the operating Engineers Union was R. L. "Dick" Hollingsworth and A. A. Rossman?

A. That is right.

Q. At that time there was a discussion of territory and work covered, referring to Article 2?

(Testimony of Sam C. Guess.)

Mr. DeGarmo: Just a minute now, if your Honor please. We are getting right back into the situation we were yesterday, and I object to this upon the ground it is an attempt to show prior negotiations of the parties with respect to an intent as to this contract.

The Court: What was the date of this?

A. November the 3rd, 1955.

Mr. DeGarmo: November 3rd, 1955. [511]

The Court: What is the purpose of this, Mr. Etter?

Mr. Etter: I haven't got to it. I am going to ask the question and if counsel objects and your Honor rules, I won't pursue it any further. Then if it later develops that it is inadmissible, I will make it as an offer of proof in our case. That is what I want to do. In view of your Honor's ruling, I want to ask the question. I won't pursue it any further if there is a ruling on it.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Etter): Do you recall that there was a discussion with respect to the territory and work covered and that the demand and the request was made to clarify more clearly Idaho County, North Half, and Hanford?

Mr. DeGarmo: Just a minute now, Mr. Guess. I object to the question upon the ground that it calls for the witness to state testimony with respect to the prior negotiations of the parties leading up to the execution of this contract and can only be offered for the one purpose of trying to show some

(Testimony of Sam C. Guess.)

variance between the terms of the contract and the intent of the parties.

The Court: Well, I will sustain the objection.

Q. (By Mr. Etter): One more question, then. Do you recall that at that meeting Mr. Dewey Morrow, whom you [512] have just referred to and who was a representative of the A.G.C., stated, in substance and effect, that the A.G.C. is not and was not interested in the Hanford Project because of the fact that it was an old agreement with different fringe benefits contained in it?

Mr. DeGarmo: I object to that question upon the same ground, if your Honor please.

The Court: All right, sustained.

Mr. Etter: Now, I can make an offer of proof now or in my case in chief, whichever——

The Court: Well, I should think the logical place would be in your case. This is only cross-examination, after all.

Mr. Etter: Fine.

The Court: Does that conclude your cross-examination?

Mr. Etter: Just have one or two questions.

The Court: Yes, all right, go ahead.

Q. (By Mr. Etter): Mr. Guess, in December when you signed these contracts for A.G.C. with the defendant unions, you knew at that time that there were members of the defendant unions working for Morrison-Knudsen on the Project?

A. Yes, sir.

Q. You knew that? [513]

(Testimony of Sam C. Guess.)

A. I knew that M-K was on the Project and I have the agreements with the five basic crafts and I would assume that they were working some of my people.

Q. And at the time you signed these agreements with the unions, you knew, too, that the employees were working under the Hanford Works basic agreement, isn't that true?

A. Yes, sir, I knew they were working for the J. A. Jones Company down there.

Q. Yes, under the Hanford Agreement?

A. Right, being paid isolation pay and being furnished bus transportation.

Q. That's right.

Mr. Etter: I think that is all, Mr. Guess.

Redirect Examination

By Mr. DeGarmo:

Q. Mr. Guess, what, if anything, did you have to do with the letter which was written by Mr. McCaffree as Executive Secretary of the Hanford Contractors Negotiating Committee of December 29, 1955, which has been referred to as the letter terminating the Hanford Works Agreement contract?

A. I received a copy of it, Mr. DeGarmo.

Q. Was that your only connection with it?

A. That was my only connection, that and telephone [514] conversations back and forth about it.

Q. Was he speaking for you or your members?

(Testimony of Sam C. Guess.)

A. He was not speaking for me and it came as very much of a shock that such a letter would be written.

Q. Now, reference has also been made to a letter of March 10th—not the letter of March 10th, but the letter which you stated you received from Mr. McCaffree. By the way, do you have a copy of that letter?

A. I believe it is in my brief case, sir.

Q. The letter relating to assignment of bargaining rights is the one that I am referring to.

A. It would be in my brief case, I think.

Q. Well, perhaps we can cover it without the letter itself. What, if anything, did you have to do with that letter which Mr. McCaffree wrote to you purporting to assign bargaining rights?

A. Well, after talking it over with Mr. McCaffree on the telephone and Mr. Henry Thurston of the A.E.C. staff, I called a meeting of the labor committee of the Spokane Chapter.

Q. I am talking about before the letter was written?

A. I had nothing to do with it, sir.

Q. Had he obtained your approval to any such an assignment?

A. No, sir. [515]

Q. Now, when you mentioned during your cross-examination that you had agreed to consider hardship or that you had mentioned hardship cases, were those hardship cases to be considered outside of the A.G.C. agreement or as a part of an addendum to the A.G.C. agreement?

(Testimony of Sam C. Guess.)

A. We offered in the instance of the Hanford Agreement to make an addendum to the A.G.C. agreement. Perhaps it would be interesting to the Court to get our viewpoint particularly on this.

Q. Well, let's just stick to questions and answers. A. Okay.

Q. And then if the Court has any questions, he is always free to ask you.

A. It was an addendum—it was to be an addendum to the A.G.C. agreements.

Q. Well, now, in these negotiations which you testified to yesterday and to which some reference was made today, which occurred between January 1st of '56 and sometime in March of '56, did those negotiations relate to such an addendum or attempting to negotiate such an addendum?

A. We were attempting to arrive at some method or some machinery by which the labor harmony could be reached at Hanford. It was our intention and our express purpose and our expression in writing to those unions to make this machinery or the clauses under which we would [516] operate a part of an addendum to the normal A.G.C. agreement. We would say Schedule B, perhaps.

Q. You mentioned that on the 10th day of March some March 12th dead limit had been set for furnishing of transportation and the payment of isolation pay?

A. That is correct. We had gone as far as we could. We had set the deadline of March the 12th and we would furnish the isolation pay and furnish

(Testimony of Sam C. Guess.)

the busses, and then during the negotiations, Mr. DeGarmo, we made a proposition to them that we would extend that isolation pay and bus transportation one more week in order to try to reach a settlement on it.

Q. That was to the 19th?

A. That is correct.

Q. Now, was there any further extension?

A. Yes, sir, we had a meeting up here on March——

The Court: Pardon me, I didn't get that. When was it you made the extension to the 19th?

A. We made—on March the 10th——

The Court: Oh.

A. ——we agreed that we would project the isolation and bus transportation to March the 19th, and then in our meeting on March the 19th, we agreed to hold over waiting word that some of the unions wanted to get in touch with the Seattle people, Seattle Teamsters, we extended it another [517] day. Actually, we extended it to the 21st. One of my members I was unable to reach or, as a matter of omission, I did not notify one of my contractors, and he furnished bus transportation an extra day, on March the 22nd, I believe it was.

Q. When this extension of time was given, first to the 12th and then to the 19th and then I think you said for one additional day, and, in fact, until the 21st, what was to happen at the end of that time?

A. We would either have an agreement or, if no

(Testimony of Sam C. Guess.)

busses were there, there would be no people going to work, and we were so told in very precise terms that unless we furnished the busses, that there would be no men going on the jobs.

Q. Well, what contract was to be in effect?

A. The A.G.C. contract was to go into effect the day that we finished our agreements with them.

Q. Now, Mr. Guess, under—well, I guess we don't have the exhibits. I want to direct your specific attention to that which has been introduced in evidence here as Exhibit 2 and to Article 7, which reads:

“No Strike, No Lockout. It is mutually agreed that there shall be no strikes, lockouts, or other slowdowns or cessation of work authorized by either party on [518] account of any labor differences pending the full utilization of the grievance machinery set up in Article 9, provided that employees covered by this agreement shall not be expected to pass through a legally established picket line which has been placed by another American Federation of Labor union.”

Now, in your testimony yesterday you mentioned some offer to arbitrate or mediate this matter of the dispute? A. We did, sir.

Q. And was that under the agreement of Article 9 as far as the Teamsters' contract was concerned?

A. Yes, sir, and under Article 10 of the Engineers' agreement.

Q. There is a similar provision in the Engineers' agreement, which is Exhibit 3?

(Testimony of Sam C. Guess.)

A. That is correct.

Q. And what happened with respect to that offer?

A. We were told by Mr. Sewell Davis of the Teamsters that they would not arbitrate. We were also told by Mr. Rossman that he could not arbitrate.

Q. To your knowledge, was there any arbitration by either the Engineers or Teamsters prior to March 23rd, 1956? [519]

A. There was no arbitration, sir.

Mr. DeGarmo: Now, if your Honor please, that completes my redirect of this witness. If counsel has some further questions, I would like him to ask them now and I would like to then ask the permission of the Court to address some further direct questions to Mr. Guess on a subject which I overlooked yesterday.

The Court: Very well. Do you have any further questions?

Mr. DeGarmo: On a subject that has not been covered.

Mr. Etter: I have just about four, I think.

The Court: Yes, all right.

Recross-Examination

By Mr. Etter:

Q. Actually, then, Mr. Guess, the withdrawal that you have mentioned of bus transportation and isolation pay was a joint withdrawal by your members, acting through you, and the Hanford Contractors Committee, was it not?

(Testimony of Sam C. Guess.)

A. It was a withdrawal of my people that had gone as far as they thought they should go.

Q. Yes, but you know that the others withdrew, too, don't you?

A. I do not know that, no, sir; I am only stating that [520] Morrison-Knudsen withdrew.

Q. And up until that time, both A.G.C. and Hanford were negotiating respectively with the same two defendant Unions on the Hanford dispute?

A. All negotiations from March the 10th on were conducted in Spokane, Washington.

Q. That's right, but prior to the 8th, they were being carried on separately by Hanford and by you?

A. Up until the 8th, I don't believe that we entered into any formal—we did not enter into any formal negotiations with the unions concerning any question at Hanford.

Q. But there were negotiations going on with them by Hanford?

A. That I do not know, Mr. Etter.

Q. Well, you talked with Mr. McCaffree several times?

A. I talked with Thurston and I talked with McCaffree and there were lots of things said.

Q. Yes, all right. As I understand, this job was a building construction job, is that right, down there?

A. This was a heavy engineering project, Mr. Etter.

(Testimony of Sam C. Guess.)

Q. Oh, oh. Was it building a building?

A. No, sir, it was a pumping plant.

Q. Pumping plant, all right.

Mr. Etter: That is all, Mr. DeGarmo.

Mr. DeGarmo: This will be direct, if your [521]
Honor please.

The Court: All right.

Mr. DeGarmo: On a different subject.

The Court: You may have further direct, then.

Direct Examination

(Resumed)

By Mr. DeGarmo:

Q. Mr. Guess, I am handing you that which has been marked as Plaintiff's Exhibit 2 and I call your attention on page 12, it is under Article 10, Schedule A, a subject entitled "Health and Welfare," and I would like to ask you to state whether there was a health and welfare plan which had been negotiated through the A.G.C. Chapter, Spokane—A.G.C. Spokane Chapter?

A. The Spokane Chapter of the Associated General Contractors in the summer of 1953 negotiated a health and welfare plan with the Teamsters, and at the same time but not in concurrent negotiations, conducted a health and welfare plan with the Operating Engineers.

Q. Now, what is the fact as to whether during the existence of the Hanford Works Agreement there was also a health and welfare plan provided thereunder?

(Testimony of Sam C. Guess.)

A. To my knowledge, there was no health and welfare plan for the Hanford Contractors. They came into and became a party of the members contributing to the Spokane [522] Chapter and the Eastern Washington Builders Chapter A.G.C. plan, or health and welfare plan, and the members of the Spokane Chapter and the Eastern Washington Builders Chapter of A.G.C. were the trustees. There were no trustee representatives on the health and welfare plan who came from the Tri-City area.

Q. Then, the contributions which were made to the health and welfare plan, regardless of whether they came from your membership or from contractors who were doing business at Hanford and were not members but were contributing under the Hanford Works Agreement, went to the same set of trustees both for the Teamsters and for the Operating Engineers? A. That is correct.

Mr. DeGarmo: That is the only further questions I have, your Honor.

Cross-Examination

(Resumed)

By Mr. Etter:

Q. The employees working on A.E.C projects with A.E.C. contractors were covered, were they not, by an Eastern Washington Health and Welfare Plan that was handled by the employers at Hanford and negotiated by the Hanford Contractors Negotiating Committee?

A. Not to my knowledge, Mr. Etter. [523]

(Testimony of Sam C. Guess.)

Q. For employees on the Hanford Project?

A. Not to my knowledge, sir.

Q. You don't know whether they were or not?

A. I do not.

Mr. Etter: All right, that is all.

Mr. DeGarmo: That is all, Mr. Guess.

The Court: Is that all with this witness, then?

Mr. DeGarmo: Yes.

The Court: All right.

The Witness: Thank you, sir.

(Witness excused.)

Mr. DeGarmo: Mr. Reed, will you come forward, please, and be sworn?

RAMON E. REED

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Your name is Ramon E. Reed?

A. Yes, sir.

Q. And the Reed is R-e-e-d?

A. That is correct.

Q. And the first name, is it R-a-y-m-o-n-d or R-a-m-o-n? A. R-a-m-o-n. [524]

Q. Mr. Reed, where is the present place of your residence, if you are able to tell me?

A. My residence? Richland. I am presently

(Testimony of Ramon E. Reed.)

working on the Kings River Project in California out of Fresno.

Q. You are employed by the Morrison-Knudsen Company?

A. Yes, sir, out of the Los Angeles District.

Q. For how long a period of time, Mr. Reed, have you been an employee of the Morrison-Knudsen Company?

A. In 1952, I was employed, I started employment with the Morrison-Knudsen Company of Canada, Incorporated, and in December of 1955, I came to Richland with Morrison-Knudsen Company, Incorporated.

Q. For the purpose of the record, will you state your age, Mr. Reed? A. 44.

Q. Will you state what formal education you have had?

A. I have a B.S. degree in Civil Engineering at Pennsylvania State College.

Q. And give us some idea of your background, Mr. Reed. Will you state what various activities you have followed since your graduation from the University?

A. In 1935 I went with the Tennessee Valley Authority. I stayed with them until 1939, during which I was on survey crews and inspection. '39 and '40 I was with the Pennsylvania Turnpike Commission. I was inspector on [525] tunnel work; '40-'41, Nantahala Power and Light Company, a subsidiary of the Aluminum Company of America, on a hydro project in North Carolina as assistant

(Testimony of Ramon E. Reed.)

resident engineer; '41 to '44, with Aluminum Company of America on construction of an aluminum smelter in Massena, New York, and buildings, in New Kensington, Pennsylvania; '45 to '52, with the Kenwise, Incorporated, a contractor, in Pittsburgh, Pennsylvania; '52 until the present—well, '52 until '54, I was on the Alcan Project in British Columbia; '55 I was on the Dew Line Construction with the Northern Construction Company—it is another subsidiary of Morrison-Knudsen Company, Northwest Territories, and the rest has been here at Richland.

Q. What connection did you have, Mr. Reed, with the particular project with which we are concerned here, the Hanford Works contract between Morrison-Knudsen Company and the Atomic Energy Commission?

A. I was project manager.

Q. What is the office or duties of a project manager on a project such as that?

A. To direct the work and see that the funds you spend are spent correctly.

Q. Are you the chief officer in charge of the project? A. Yes, sir.

Q. Will you state now when you first became connected with [526] that project and when you discontinued your connection with the project?

A. I arrived in Richland about the middle of December and left Richland the first day of April—that was December of 1955, and I left in April, April 1st, 1957.

(Testimony of Ramon E. Reed.)

Q. Was the project completed at the time you left in April of 1957?

A. Not quite, I think it was completed in May sometime.

Q. Shortly after your departure? A. Yes.

Q. Now, at the time that you first arrived at Richland in connection with this project in December of 1955, had the work upon the project already commenced?

A. There was some of our office people were there and a subcontractor, Irwin Construction, had started to move onto the project to do the excavation.

Q. Can you state for us, Mr. Reed, as of January 1, 1956, how many Teamsters were employed on that project?

A. I believe we had one Teamster. He was employed right at the end of December or just after the first. I believe there was one on that project there.

Q. And as of the same date of January 1, 1956, how many Operating Engineers were then employed? A. I believe we had one.

Q. Mr. Reed, as the project manager of the project for [527] Morrison-Knudsen Company, Inc., did you become acquainted with the fact that the Hanford Works Agreement, so-called, had been terminated?

A. You mean by the time I arrived?

Q. No, I just asked first if you became ac-

(Testimony of Ramon E. Reed.)

quainted with it. I will get to the time later. Were you acquainted with the fact that it had been terminated?

A. Would you please repeat that?

Q. The question was, did you become acquainted with the fact at some time that the Hanford Works Agreement had been terminated? A. Yes.

Q. Will you state how you became acquainted with that fact?

A. I received a copy of that December 29th letter.

Q. Was that letter signed by Mr. McCaffree?

A. Mr. McCaffree.

Q. And can you tell us approximately when it was received by you?

A. Oh, I would imagine it was sometime from the 29th, very shortly after the 29th, whenever it was mailed. I don't remember the exact date.

Q. Well, can we fix it in this way: You were in the courtroom yesterday when Mr. Knack testified of a meeting being held in Richland on the 5th of January, 1956. Was it received by you prior to the date of that meeting? [528]

A. I'm sure it was.

Q. Now, following the receipt of that notification that the Hanford Works Agreement had been terminated, under whose advice or by whose direction did you continue on the project to furnish bus transportation and isolation pay?

Mr. Etter: I will object to that; I don't think

(Testimony of Ramon E. Reed.)

that is material, has anything to do with this, who directed him to do what.

The Court: Well, I will overrule the objection.

Mr. DeGarmo: Well, I think it is material in that it shows the motive and reason for the furnishing of those benefits after the first of January.

A. The Atomic Energy Commission.

Q. The Atomic Energy Commission?

A. Yes.

Q. Was there some specific person in connection with the Atomic Energy Commission?

A. I believe it was Mr. Thurston, as I recall.

Q. Did you then continue after the first of January, 1956, Mr. Reed, to furnish bus transportation to the Teamsters and Operating Engineers for a period of time? A. Yes, sir.

Q. And did you continue to pay isolation pay for a period of time? [529] A. Yes, sir.

Q. Was there a time, Mr. Reed, when you ceased to furnish bus transportation and to pay isolation pay? A. Yes, sir.

Q. To your knowledge, Mr. Reed, were any negotiations being carried on concerning the matter of bus transportation and isolation pay between January 1, 1956, and the time when you have stated you ceased to furnish bus transportation and pay isolation pay?

A. Yes, I attended several meetings as an observer in which the Hanford Contractors were trying to negotiate an agreement up until—oh, I think

(Testimony of Ramon E. Reed.)

it was around March 8th. That was the last meeting I attended of any type.

Q. You say you attended as an observer?

A. Yes, sir.

Q. Where were those meetings held?

A. They were held in the Atomic Energy Commission's office. I don't remember what building it was.

Q. When was the date, Mr. Reed, that you ceased to furnish bus transportation and to pay isolation pay?

A. March 22nd was the last day that I paid isolation pay and bus transportation. That was previous to the strike.

Q. Had there been a termination of the furnishing of transportation and the payment of isolation pay by other contractors working on the project, working in the area [530] for the Atomic Energy Commission, prior to the time when Morrison-Knudsen Company ceased to furnish transportation and pay isolation pay?

A. Yes, sir, to my knowledge I was the only one that had the Teamsters and the Operators on the job that day.

Q. On the—— A. On the 22nd of March.

Q. On the 22nd, you were the only contractor?

A. Uh-huh.

Q. How did you learn that the others had ceased prior to that?

A. Well, I had a pour ready for concrete and

(Testimony of Ramon E. Reed.)

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A. Uh-huh.

Q. How did you learn that the others had ceased prior to that?

A. Well, I had a pour ready for concrete and

(Testimony of Ramon E. Reed.)

the concrete didn't show up and I started looking around to see what was the matter and found out no Teamsters on the job.

Q. When you ascertained that fact, what did you do?

A. Well, I think, as I recall, I jumped on the phone to Mr. Guess and asked him what the deal was.

Q. Did you find out? A. Yes.

Q. As of the 23rd, did you furnish transportation? A. No, sir.

Q. Did you have any conversation with representatives of the Teamsters or the Operating Engineers on the 22nd concerning the matter of continued furnishing of bus transportation and the payment of isolation pay? [531]

A. No, sir, our dealings were all with Mr. Guess, I didn't have any conversation at all with the local people.

Q. On the 23rd day of March, 1956, what Teamsters reported for work on your project?

A. Well, that time we had——

Q. Now, on the 23rd, I am asking you what reported on the 23rd? A. Oh. None.

Q. How many Teamsters were in the employ of Morrison-Knudsen Company on the 22nd and worked on the 22nd of March?

A. We had two I know of, I believe that was all. There might have been three, but I know there was two Teamsters.

(Testimony of Ramon E. Reed.)

Q. And approximately how many Operating Engineers were working and did work on the 22nd of March? A. I believe there was two.

Q. Did any of those show up for work on the following day, the 23rd? A. No, sir.

Q. Was there any other craft employed on that project by Morrison-Knudsen Company which failed to appear for work on the date of March 23rd? A. Yes, the Cement Finishers.

Q. Who is the business agent for the Cement Finishers, Mr. Reed? [532] A. Mr. Knapp.

Q. What contract, if any, did Morrison-Knudsen Company have as of the 22nd or 23rd of March, 1956, with the Cement Finishers?

A. None whatsoever.

Q. Mr. Reed, what pickets were there on the job or in connection with the approaches to the job on either the 22nd or the 23rd of March, 1956?

A. There were no pickets, the job was not picketed on those dates.

Q. When was the first date upon which pickets appeared? A. I believe it was April 5th.

Q. And where did the pickets appear?

A. The only one I am positive about is the one at the bridge at the entrance to Richland, to the city of Richland.

Q. Did you have opportunity to personally observe that picket?

A. Yes, I made a point to.

Q. Was the picket carrying any sign or placard?

(Testimony of Ramon E. Reed.)

A. There was a sign. He wasn't carrying anything, he was leaning against a car, there was a sign there.

Q. What did it say?

A. Oh, it said, "Hanford Contractors Unfair to Teamsters Union," such and such, "Operators Union" number such and [533] such, and "Cement Finishers." It may not have been in that order.

Q. The three unions were named?

A. Yes.

Q. Now, you have testified that neither the Teamsters nor the Operating Engineers appeared for work on the 23rd of March. Was the work available for them on that day? A. Yes, sir.

Q. When was the next date, Mr. Reed, if you can fix it, that either Teamsters or Operating Engineers appeared for work in connection with the Morrison-Knudsen Company projects?

A. Well, the strike was officially ended June 5th, but we didn't go back to work for about a week, around the 1st of the following week that we went back to work, on Monday of the week following the 5th.

Q. You say the strike was officially ended on the 5th of June; was there some event that signalled or marked the end of the strike?

A. I was advised by Mr. Guess that the strike was over. The pickets were taken down.

Q. The pickets were taken off at that time?

A. Uh-huh.

(Testimony of Ramon E. Reed.)

The Court: What date was that, did you say?

A. June 5th. [534]

The Court: June 5th?

Mr. DeGarmo: Yes. He testified that they did not actually resume work immediately afterwards, but the strike was officially ended at that time.

Q. Mr. Reed, from January 1st, 1956, until the time when you left the project in April of 1957, were payments made to the health and welfare fund of the Teamsters upon the wages of Teamsters employed on the project by Morrison-Knudsen Company, Inc.? A. Yes, sir.

Q. And under what contract were those payments made?

A. Associated General Contractors.

Q. And were payments made to the health and welfare fund of the Operating Engineers?

A. Yes, sir.

Q. From the period January 1, 1956, until the time you left the project in April of 1957, upon the wages of employee members of the Operating Engineers? A. Yes, sir.

Q. And under what contract were those payments made?

A. Associated General Contractors.

Q. To your knowledge, was there any other contract in effect between Morrison-Knudsen Company and either the Teamsters or Operating Engineers with any other health and welfare payments? [535]

A. No, sir, not that I know of.

(Testimony of Ramon E. Reed.)

Mr. DeGarmo: Might I have the court file, if your Honor please?

The Court: Yes.

Mr. DeGarmo: There is a document attached to one of the requests for admission that I wish to examine the witness concerning.

(File handed to Mr. DeGarmo.)

Q. Mr. Reed, I am showing you a document which is attached as Exhibit G to Plaintiff's Request for Admissions under Rule 36, the original of which was filed in this cause, on January 17, 1957, and I wish to ask you if you will examine both Exhibit G and Exhibit H and state if you have previously seen the originals of which those appear to be photostatic copies or purport to be photostatic copies? A. Yes, sir.

Q. Will you state the circumstances under which you saw them?

A. They were left at our office in the hands of Mr. Ralph Nelson, our office manager, by Mr. Griffin of the Teamsters. That is what he told me.

Q. I notice that this purports to be—referring to Exhibit G—purports to be an agreement dated 14 November, 1956, between University Plumbing and Heating Company and the [536] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. What relationship, if any, did University Plumbing and Heating Company have to your job as Morrison-Knudsen Com-

(Testimony of Ramon E. Reed.)

pany under your contract with the Atomic Energy Commission?

A. They were our subcontractors on the installation of piping on this contract that we had.

Q. What did you do with these two documents after they came to your attention?

A. They were passed on to University Plumbing and Heating.

Mr. DeGarmo: In order that these might have some significance to the Court, I will just explain briefly that they are agreements providing for compliance by the University Plumbing and Heating with the Associated General Contractors' agreement with respect to health and welfare fund.

Q. As I understand it, Mr. Reed, you have no personal knowledge as to whether those were executed by the University Plumbing and Heating or not?

A. No, sir, I do not have.

Mr. DeGarmo: You may examine, Mr. Etter.

Cross-Examination

By Mr. Etter:

Q. Mr. Reed, you were doing some work, either directly or [537] through a subcontractor by the name of Irwin, on your project, were you not, in November and December of 1955?

A. The latter part of December.

Q. Latter part of December. And isn't it a fact that there were from four to eight Operating Engineers that were engaged on that project on the excavation part of it during that time?

(Testimony of Ramon E. Reed.)

A. I cannot tell you because I was not cleared to the area and I made one visit to the area before the middle of January, took me five weeks to get cleared into the area.

Q. And you knew there were several Teamsters along with the Operating Engineers that were working on that excavation project?

A. I knew there must be Operators and Teamsters out there, but how many, Mr. Etter, I did not know.

Q. That's right. So you are not meaning, I'm sure, to convey to us that there were only one of each there that had worked on that project when you were there?

A. They were on our own payroll.

Q. That's right. And Mr. Irwin wasn't in any different position than University Plumbing with this exhibit that has just been shown, he was a subcontractor of yours, wasn't he? [538]

A. Yes, sir, he was.

Q. And, I gather, was doing excavation work?

A. That is correct.

Q. That's correct. And was a sub, I understand, if you know, to the Hanford agreements providing isolation pay and so forth?

A. That is correct.

Q. Now, were you at a meeting on January, the 15th at the labor hall?

A. Yes, sir.

Q. In company with Mr. Knack?

A. Yes, sir.

(Testimony of Ramon E. Reed.)

Q. Are you acquainted with Mr. Knapp, Charles Knapp, who is seated here at my right?

A. Yes, sir.

Q. Do you recall at that meeting Mr. Knapp, in the presence of numerous men that were there—are you acquainted with Mr. Ed Clarey?

A. I have met Mr. Clarey, uh-huh.

Q. With Mr. King of the Millwrights?

A. Yes, I know Mr. King.

Q. With Mr. Lewis of the Teamsters?

A. Yes, I know Mr. Lewis.

Q. Mr. Rossman, who is seated here?

A. Yes, sir. [539]

Q. Mr. William Dunn of the Engineers?

A. Yes, sir.

Q. Do you recall whether those men were at that meeting on January 5th?

Mr. DeGarmo: Just a minute, Mr. Reed.

I don't wish to make technical objections, but I think this is not proper cross-examination inasmuch as I did not touch the meeting, this particular meeting, with this witness. I know what counsel wants, he probably would want that evidence in his own case, but I don't think it is proper cross-examination.

Mr. Etter: I thought you went into meetings, but you let this one go by and didn't examine about it.

Mr. DeGarmo: I didn't go into the meetings.

The Court: No.

(Testimony of Ramon E. Reed.)

Mr. DeGarmo: Probably will come out eventually but I——

The Court: I think I will permit him to examine the witness while he is on the stand.

Mr. Etter: Otherwise, I will hold him here and call him back. I thought he had.

Q. In any event, do you recall being at the meeting? A. Oh, yes.

The Court: Pardon me, what is the date? [540]

Mr. Etter: January 5th, the afternoon of January 5th.

The Court: Oh, yes, I see.

Mr. Etter: 1956.

Q. Do you recall that at that meeting Mr. Knapp said, in substance and effect, to Mr. Knack—we have got two pretty close ones, Knapp and Knack—Mr. Knapp said to Mr. Knack, in substance and effect, “We are interested in knowing what the situation is going to be,” or words to that effect, “under our employment relationship,” and to that effect, something said of that nature? Do you recall that? A. There was a discussion.

Q. Yes. Do you recall that then Mr. Knapp said to Mr. Knack, “We want to know and our people want to know whether or not your company is going to abide with the Hanford Agreement and pay isolation pay and continue bus transportation”?

Mr. DeGarmo: Just a minute——

Q. (By Mr. Etter): Do you remember that?

Mr. DeGarmo: Just a minute, Mr. Reed.

In order to preserve the record, if your Honor

(Testimony of Ramon E. Reed.)

please, I wish to show an objection to this line of questioning upon the ground that it is an attempt, apparently, by the defendants to show some oral agreement [541] relating to the time involved in this litigation which has not been pleaded as an affirmative defense or relied upon and is contrary to the admission as made in their answers to requests for admission.

The Court: The record may show that your objection goes to the whole line of testimony without repeating it.

Mr. Etter: May I proceed, your Honor?

The Court: Yes.

A. I remember some discussion along those lines, but the exact wording, I do not remember.

Q. (By Mr. Etter): Well, do you remember that Mr. Knack said then to Mr. Knapp and to Mr. Dunn and these men who were talking with him at this meeting, in words in substance and effect as follows: "We bid this job under the Hanford Agreement, that provided isolation pay and bus transportation, and we are going to complete the job under those conditions or that agreement"?"

A. I could not say that I remembered that.

Q. You couldn't say you remember?

A. No, sir.

Q. Did you hear that discussion?

A. There was a discussion along those lines, but I cannot swear——

Q. You don't remember just what Mr. Knack did say? [542]

A. No, sir, I do not.

(Testimony of Ramon E. Reed.)

Q. Is that correct? A. That is correct.

Q. All right. Now, as I gather it, it is your understanding that the strike or the work stoppage—we prefer to call it lockout—ended in June, is that right?

A. The pickets were removed on June 5th.

Q. Of '56? A. Uh-huh.

Q. You, of course, did not have any Engineers employed on the particular part of your project until August, isn't that correct?

A. No, sir, that is not correct.

Q. All right, when did you have any Engineers of Local 370 working back on your particular project after the dispute terminated in part?

A. I cannot tell you without looking at our payroll.

Q. It wasn't in June, was it?

A. I remember we brought a crane in and it may have been the latter part of June, I don't remember, Mr. Etter.

Q. Well, as a matter of fact——

A. It was the latter part of June, anyway.

Q. Excuse me. As a matter of fact, during a considerable interval between March and June, you people had taken [543] your machinery down to California, isn't that right? A. No, sir.

Q. You had taken none of the machinery that operated by Engineers?

A. Not to California.

Q. Well, had you moved it out to other projects?

A. Oh, yes.

(Testimony of Ramon E. Reed.)

Mr. DeGarmo: It seems to me, if your Honor please, we are getting into the question of damages now rather than the question of breach of contract.

Mr. Etter: I am just asking, I am trying to fix a date here. He says they came back to work in June.

The Court: I will overrule the objection.

Q. (By Mr. Etter): But I mean you had moved the machinery out to other projects?

A. We had removed some, yes.

Q. And it is fair to assume that you brought these men back to work when you had the machinery available, whenever that date was?

A. What men?

Q. Engineers? A. Yes, sir.

Mr. Etter: That is all.

Mr. DeGarmo: That is all, Mr. Reed. [544]

* * *

Cross-Examination

By Mr. Carey:

Q. Mr. Reed, a few moments ago you will recall that Mr. DeGarmo showed you a photostatic copy of a document which concerned the University Plumbing and Heating Company?

A. Yes, sir.

Q. And he referred to the original file. I am now showing you my file, but I think you will recognize it is another photostatic copy.

A. Yes, uh-huh.

(Testimony of Ramon E. Reed.)

Q. I notice it is dated November 14, 1956? [545]

A. Yes, sir.

Q. And at that time the University Plumbing and Heating Company was doing some work for you?

A. Yes, sir.

Q. Now, the work stoppage or strike or lockout, whichever it was, had ceased in June of 1956, hadn't it?

A. That is correct.

Q. Some five months prior to the date of this document?

A. Yes, that's right.

Q. That's right, isn't it?

A. Yes.

Q. So that at the time of the controversy, difference of opinion, or whatever you want to call it, this document was not in effect, was it?

A. That is correct.

Q. Do you recall how long the University Plumbing and Heating Company was on that job as your subcontractor?

A. They were on right through the entire——

Q. Pardon?

A. They were on it during the entire length of the contract.

Q. I noticed it says down here, "Payment for the plan becomes effective December 1st, 1956, for all hours worked by Teamster personnel previously to November, 1956." By that time, everything was peaceable and the [546] controversy was settled for everything but a lawsuit, wasn't it?

A. Well, I don't know whether it was ever peaceful out there, but, yes, it was.

Q. That's right. All right. Now, do you know

(Testimony of Ramon E. Reed.)

how many Teamsters employed by the University Plumbing and Heating Company were employed by that concern as your subcontractor?

A. What period?

Q. During the period covered by this document, whatever that period is? A. One.

Q. One. Now, that particular teamster worked inside, or drove a truck, or drove something, both inside and outside the Atomic Energy area, didn't he? A. Yes, he drove a bus.

Q. Yes. Both inside and outside?

A. Yes.

Mr. Carey: That is all.

The Court: Any other questions?

Mr. DeGarmo: That is all, Mr. Reed.

The Court: That is all. Court will recess for ten minutes.

(Witness excused.) [547]

Mr. DeGarmo: If your Honor please, there is one further feature of the case upon which I wish to offer proof before resting the plaintiff's case in chief.

I believe that I am able to stipulate with Mr. Carey, on behalf of the Teamsters, that the failure of the men to report for work on March the 23rd after the failure to furnish bus transportation was with the knowledge and approval of the local union officials of the Teamsters. That is the Teamsters only.

Mr. Carey: That is correct. I am speaking, you

understand, now only for the Teamsters, not for the Engineers.

The Court: I understand that, yes, and for the Teamsters Local, of course, they are the only ones.

Mr. Carey: That's right, the Teamsters Local.

Mr. DeGarmo: That's right. I have not been able to stipulate with the Operating Engineers and I wish to call Mr. Arthur Rossman to the stand.

The Court: All right.

ARTHUR A. ROSSMAN

called and sworn as a witness by the plaintiff, was examined and testified as follows: [548]

Direct Examination

By Mr. DeGarmo:

Q. Your name is Arthur A. Rossman?

A. That's right.

Q. And where do you reside, Mr. Rossman?

A. In Spokane.

Q. And what is your business or occupation?

A. I am business manager for Engineers, Local 370.

Mr. DeGarmo: I wish to state, if your Honor please, that I am calling Mr. Rossman as an adverse witness.

The Court: All right.

Q. (By Mr. DeGarmo): As business manager for Local 370 of the International Union of Operating Engineers, did you hold a similar position in 1955? A. Yes, sir.

(Testimony of Arthur A. Rossman.)

Q. And also during the year 1956?

A. Yes, sir.

Q. You were its business manager then on March 22nd and March 23rd of 1956? A. Yes, sir.

Q. Mr. Rossman, as business manager of the International Union of Operating Engineers, were you advised on the 22nd of March, 1956, that bus transportation and isolation [549] pay had been discontinued by certain of the contractors doing business in the Hanford Works area with the Atomic Energy Commission?

A. Was I informed?

Q. Yes, sir.

A. Yes, by telephone that day.

Q. As a matter of fact, Mr. Rossman, you had been advised at a meeting held on the 19th of March by Mr. Guess, that the furnishing of bus transportation and the payment of isolation pay would cease as of the 19th, had you not?

A. I don't recall, but I believe so.

Q. Do you recall that at a meeting on the 19th you were advised that an extension——

A. Mr. DeGarmo, if I may, I was informed that bus transportation and isolation pay were going to be discontinued. I am not sure that the date was stated.

Q. You do not recall the date of March 19th as the specific date which was fixed then, is that true, Mr. Rossman?

A. That's right, not without referring to minutes or records.

(Testimony of Arthur A. Rossman.)

Q. Well, do you have minutes or records which would refresh your recollection as to that statement?

A. I am not sure of that as to that particular meeting. I [550] have minutes of numerous meetings.

Q. Well, do you have minutes available with you in court here which would——

A. Have some meetings.

Q. ——refresh your recollection? Well, will you see if you have minutes of a meeting of March 19th? First, of a meeting of March 10, 1956?

A. Did you want me to go down, Mr. DeGarmo?

Q. Yes, if you will. I assume that you can better than anyone else.

(Witness complies.)

A. I don't have minutes of that meeting of March 19th. Mr. Hollingsworth is the secretary, I just consulted with him, and he wasn't present at that meeting and he keeps the minutes, not I.

Q. I see. You are not in the custom of keeping minutes, is that right?

A. That's right. He does when he is present.

Q. Well, Mr. Rossman, do you recall attending a meeting in Spokane, Washington, on the 21st day of March, 1956?

A. Could you help by telling me where it was and who attended it?

Q. Yes, sir. A. The dates?

Q. This was a meeting held at the Associated General [551] Contractors' office in Spokane. There

(Testimony of Arthur A. Rossman.)

were present Mr. Peterson and Mr. Zeman on behalf of the Federal Mediation and Conciliation Service; Mr. Charles Knapp on behalf of the Cement Finishers; Mr. Davis on behalf of the Teamsters; Mr. Sather, Mr. Helvey, Mr. Guess and Mr. Carbon on behalf of the A.G.C. chapters; Mr. Rossman and Mr. Dunn on behalf of the Operating Engineers; Mr. McReynolds and Mr. McCaffree on behalf of J. A. Jones Company.

A. I was at that meeting.

Q. That brings it back, rings a bell?

A. That's right.

Q. Do you recall, Mr. Rossman, that at that meeting it was stated to you that there would be no bus transportation furnished unless you were willing to arbitrate the matter of the bus transportation and the isolation pay under the grievance procedure of the A.G.C. contract and agree to that at that time, that there would be no bus transportation furnished the following day, nor would there be any isolation pay for your members, the A.G.C. agreements would be put in strict effect at that time?

A. I recall that that was a proposition made to me, to which I did not agree.

Q. Well, I am not asking if you agreed, I assume you didn't, but I am asking if that was the statement which [552] was made to you?

A. I believe so.

Q. Then on the 22nd, you have stated that you do know that certain of the contractors did not furnish bus transportation or isolation pay, is that

(Testimony of Arthur A. Rossman.)

correct? A. Yes, sir.

Q. And did the members of your local chapter report for work to those contractors on that date?

A. On the morning of the 22nd?

Q. Yes.

A. Yes, to the bus terminal or to the parking lot.

Q. Did they go any farther than the parking lot?

A. When the busses weren't there, they went back home.

Q. You were aware of that fact?

A. Afterwards.

Q. Well, how long afterwards?

A. Within an hour or two.

Q. Did all of the members of the Operating Engineers ride the bus from Richland to the job site?

A. No.

Q. There were many of your members who used their private automobiles, isn't that correct?

A. I don't know how many, some did, yes.

Q. Well, you know, as a matter of fact, don't you, Mr. Rossman, that not any of the members, whether they rode [553] busses customarily or whether they drove their own automobiles, reported for work on that morning of March 22nd, isn't that correct?

A. I don't believe any of them drove their cars beyond the barricade.

Q. At any time?

A. Prior to that, I don't think so. I can't be sure

(Testimony of Arthur A. Rossman.)

of that. Correction, I believe they did to certain close-in areas.

Q. Well, even those members didn't report on the 22nd, did they?

A. They all reported on the 22nd.

Q. But to the——

A. I say all, substantially all of them.

Q. Out to the bus area?

A. That's right.

Q. Is where they reported?

A. That's right.

Q. Had you had any communication with your members after this meeting in Spokane on the 21st of March? A. No.

Q. You made no report to them of any kind as to the transactions which occurred at this meeting in Spokane on March 21st?

A. The day before the work stoppage, no. [554]

Q. When did you report to them?

A. Within the week prior to the work stoppage, I went down and held a meeting, a special notified meeting, of the members employed on the project and related to them an offer that had been made by the contractors for their acceptance or rejection and put it to a secret ballot at the meeting, and it was voted down unanimously, and at that meeting I urged them to continue work, that the matter was still in dispute, and I would try to negotiate a suitable settlement for them.

Q. What was the date of that meeting, Mr. Rossman, if you can give it to me?

A. I don't know the exact date; I think it was

(Testimony of Arthur A. Rossman.)

within a week, within the week, prior to the 22nd of March, I'm not sure.

Q. Well, now, at the meeting on March 21st in Spokane, you stated, did you not, that you would like another opportunity to submit the matter to your people as to whether they should arbitrate this matter rather than strike, isn't that correct?

A. I believe so.

Q. Did you submit it to them?

A. I wasn't given time.

Q. In what way? [555]

A. Well, on the day of the 21st, I had, I believe, 66 members employed there. They have to be notified by postcard. They live at Yakima, Prosser, Richland, Pasco, Kennewick. That takes a matter of a couple of days to get notice to them of a meeting. I have had meetings notified by word of mouth, but the time was too short, as I recall it. If it was on the 21st, I wouldn't have time to have a meeting that same evening, I don't think.

Q. Were you familiar with the fact, Mr. Rossman, that the members of the local union of which you are business agent did not report for work on the Morrison-Knudsen Company job on the 23rd, the morning of the 23rd of March, 1956?

A. Yes.

Q. Had you been advised by anyone on the 22nd that the Morrison-Knudsen Company, which had apparently continued one day beyond the others, would discontinue bus transportation the following day?

(Testimony of Arthur A. Rossman.)

A. I don't know, I know I think there was one employee for Morrison-Knudsen that we had, worked one day beyond the time the others stopped work for the other contractors.

Q. Well, my question is whether you were advised by anyone that Morrison-Knudsen Company, although it furnished bus transportation on the 22nd, would not continue beyond [556] that date?

A. Yes, my field representatives advised me of those things as a matter of course.

Q. And they advised you of that on the 22nd, did they not, the day before the bus transportation was not furnished? A. No.

Q. When did you learn of it?

A. I think it was some several days later before I found out that Morrison-Knudsen worked one day beyond the date the other contractors did.

Q. Mr. Rossman, did you receive a letter from Mr. Guess on or about the 23rd day of March, 1956, concerning the fact that the members of your Union were not reporting for work?

A. I received a letter from him; I don't know what the date of it was.

Mr. DeGarmo: Will you mark that as an exhibit, please?

The Clerk: Marked as Plaintiff's 8, your Honor.

The Witness: What is the date?

Mr. DeGarmo: I may have misspoken the date of this letter. It is March 30th, not March 22nd.

Q. I am handing you Plaintiff's Exhibit 8 for identification. Will you examine that and state if

(Testimony of Arthur A. Rossman.)

you recall [557] whether that is a copy of the letter which you received from Mr. Guess?

A. Yes, I received that letter. I had the original in my files.

Mr. DeGarmo: Will you also mark that, please?

The Clerk: I am marking Plaintiff's 9, your Honor.

Q. (By Mr. DeGarmo): We seem to have a question between us, Mr. Rossman. I want to ask you a direct question on the matter.

When, Mr. Rossman, do you say that the refusal or failure, whatever you want to call it, of the members of your union to report for work for Morrison-Knudsen Company, Inc., on their contract with the Atomic Energy Commission was with the consent and approval of the officers of Local 370?

A. If the date is correct, the 5th or 6th of April, when pickets were placed on the job. There were no pickets from the 22nd of March until either the 5th or 6th of April.

Q. I am handing you a letter, Mr. Rossman, dated April 3rd, 1956. Will you state if that is a letter which you wrote to Mr. Guess in response to his letter to you of March 30th, which is Plaintiff's Exhibit 8 for identification? [558]

A. Yes, sir, it bears my signature, I guess I——

Q. Will you state if any place in this letter which you have before you you stated that this failure to report for work was without your knowledge or without your consent or contrary to your instructions?

(Testimony of Arthur A. Rossman.)

Mr. Etter: The letter speaks for itself.

Mr. DeGarmo: I think it does, I will read it to the Court.

Mr. Etter: Go ahead.

Mr. DeGarmo: I offer the two exhibits.

The Court: That has been identified?

Mr. DeGarmo: Yes.

The Court: Let's see, has it been offered in evidence yet?

Mr. DeGarmo: I am offering both letters at this time.

Mr. Etter: No objection.

The Court: All right, they will be admitted, then.

The Clerk: That is the Plaintiff's 8 and 9, your Honor.

The Court: 8 and 9.

(Whereupon, the said letters were admitted in evidence as Plaintiff's Exhibits Nos. 8 and 9.) [559]

Mr. DeGarmo: The letter of March 30th, if your Honor please, is addressed to Mr. Art Rossman, Operating Engineers Local Union 370, 325 South Browne Street—

The Court: Is that number 8 or 9?

Mr. DeGarmo: This is number 8.

The Court: All right.

Mr. DeGarmo: Your Honor might prefer to read them yourself.

(Testimony of Arthur A. Rossman.)

The Court: No, you may read them. Is that March 30th?

Mr. DeGarmo: This is March 30th, 1956.

The Court: All right.

Mr. DeGarmo: Addressed to Mr. Art Rossman, Operating Engineers Local Union 370, 325 South Browne Street, Spokane, Washington.

“Dear Sir:

“On Thursday, March 22, 1956, your local union at Pasco, Washington, refused to furnish employees to the Morrison-Knudsen Company, a firm whose bargaining rights are held by Spokane Chapter, Associated General Contractors.

“I desire to point out several clauses of our existing agreement which have been violated: [560]

“Article VIII—No Strike-No Lockout. It is mutually agreed there shall be no strikes, lockouts or other slow downs or cessation of work authorized by either party on account of any labor differences pending full utilization of the grievance machinery set up in Article IX. Parenthetically I add that the Building Trades Council of Pasco refused to vote you a picket line.

“Article X—Settlement of Disputes and Grievances (a method is hereby provided). You are requested to give me an answer within the 48 hours provided.

“Article XI—Territory and Work Covered. This Agreement shall cover all Heavy, Highway and Engineering work in—Benton County—It is the Spo-

(Testimony of Arthur A. Rossman.)

kane Chapters' contention that the work is 'Engineering' and that it lies in Benton County.

"Travel Pay Zone Map. The travel pay zone map is all inclusive of the area in question. There are no exclusions.

"Very truly yours,

"SAM C. GUESS,

"Executive Secretary." [561]

The letter in reply, Plaintiff's Exhibit 9, dated April 3, 1956, is on the letterhead of International Union of Operating Engineers, Local Unions, 370, 370-A, 370-B, 370-D:

"Mr. Sam C. Guess,

"Executive Secretary,

"Associated General Contractors of America, Inc.,
Spokane Chapter,

"South 102 Stevens Street,

"Spokane 4, Washington.

"Dear Sir:

"In reply to your letter of March 30, 1956, I wish to state that I am still of the opinion frequently stated by me since the work stoppage of March 20, that there is no valid collective bargaining agreement in effect on the Hanford Works Project. My opinion is now supported by legal opinion. The opinion is based on the following facts:

"At negotiations held with the Spokane Chapter AGC on November 3, 1955, at which the contractors were represented by Dewey Murrow, Sam Guess, Frank Winslow, Mr. Sather and Neal Deger-

(Testimony of Arthur A. Rossman.)

strom, and the union represented by A. A. Rossman and R. L. Hollingsworth, the status of the Hanford Project was discussed. It was the undisputed opinion of both committees at that time that the Hanford Works Project could not [562] or would not be covered by an area agreement. Again on December 15 at a meeting with the Builders Chapter of the Associated General Contractors and representatives of Local 370, the Hanford Project was discussed and the same conclusion was reached.

“On December 15, 1955, at a time when negotiations between Local Union 370 and the Spokane Chapter, Associated General Contractors, were in progress, an offer was made by the Hanford Contractors Negotiating Committee, which provided among other things, the following:

“(1) The agreement between the particular contractor association and the respective local union or unions which is applicable for the jurisdiction of the craft or crafts on the type of construction involved and which constitutes the prevailing agreement on nongovernmental construction work in the territory surrounding the Hanford Project shall become effective on January 1, 1956, for corresponding work on the Hanford Project, except that [563]

“(a) those provisions pertaining to or providing for travel time, travel pay, transportation and/or subsistence or other allowances or provisions relating to these items shall not apply until July 1, 1956, and that

“(b) those provisions shall be modified wherein

(Testimony of Arthur A. Rossman.)

it is not already provided in the applicable individual union association area agreement, to use Richland, Washington, as the point for computation travel time, travel pay, transportation and/or subsistence or other allowances relating to these items.

“Morrison-Knudsen Company was represented, or at least had an observer on the Contractors Committee at that time.

“On December 29, 1955, the Hanford Contractors Negotiating Committee by letter cancelled the old Hanford Works agreement without having negotiated any agreement to replace it.

“In three subsequent settlement proposals made at various dates after January 1, 1956, [564] the Hanford Contractors Negotiating Committee made offers of settlement outside the scope of the AGC-Operating Engineers area agreement.

“On March 9, 1956, the Hanford Contractors Negotiating Committee by letter assigned their bargaining rights to the Spokane Chapters of the Associated General Contractors, and in the only settlement proposal offered by the Spokane Chapters Joint Labor Committee, a settlement offer was made also beyond the scope of the existing area agreement.

“In conclusion it would seem that no one, not even the several Contractors Negotiating Committees, made any attempt to apply the area Engineers-AGC agreement to the Hanford Project as written. Certainly had I felt at any time that an agreement providing for arbitration was effective on the Proj-

(Testimony of Arthur A. Rossman.)

ect, I would live up to the letter of the contract regardless of the opinion of the members I represent and who are employed on the Project.

“Very truly yours,

“ARTHUR A. ROSSMAN,

“Business Manager,

“Local No. 370.

“P.S. With reference to Paragraph (b) on Page 2, [565] at no time during any of the negotiations with either Chapter of the AGC was Richland, Washington, even remotely considered as a dispatch point for the computation of travel pay.”

Q. Now, Mr. Rossman, you say that you didn't, and this was your testimony, that April 5th was the date upon which you considered that the work stoppage or failure to report for work was with the approval and consent of the officers of your union, is that still your testimony?

A. Yes. The work stoppage was there and out of my control. It was spontaneous on the part of the members, I hadn't sanctioned it.

Q. Did you tell them to go back to work?

A. No, I asked them to stay at work before they left the job.

Q. Yes, but after they left the job and you knew that they had left the job, did you ask them to go back to work? A. I don't believe so.

Q. Isn't it a fact, Mr. Rossman, that prior to March 30th, the date that Mr. Guess wrote you a letter, your local had preferred an unfair labor

(Testimony of Arthur A. Rossman.)

charge before the Pasco-Kennewick Building Trades Council against Morrison-Knudsen Company? [566]

A. Well, I don't believe the Building Trades Council entertains unfair labor practice charges.

Q. Well, did you prefer a charge against them of unfair to labor, if you want to put it that way?

A. I believe it is customary to take a dispute before the appropriate labor council when there is a work stoppage. I presume I did.

Q. That was done after the work stoppage occurred, was it not, and prior to March 30th?

A. Very probably.

Q. Was that done with your approval and, in fact, by you?

A. I don't remember whether I did it or whether my representative down there, Bill Dunn, did, but that is a matter of procedure in work stoppages.

Q. Well, were you acting for the local or was Mr. Dunn acting for the local and its members when that was done?

A. Yes, one or the other of us. We didn't get prior strike sanction from the Building Trades Council because we didn't know there was going to be a work stoppage, and I still contend it wasn't a strike, it was a lockout, when the busses weren't there as they had customarily been since 1943.

Q. Oh, I see. Your position is that the contractors locked your union members out when they refused to furnish busses? Is that your position? [567]

A. That's right, there was no way for lots of them to get to work when the busses weren't there.

(Testimony of Arthur A. Rossman.)

Q. You know it was permissible to drive private cars within the area at that time, was it not, Mr. Rossman? A. Yes, to certain areas.

Q. Well, to this particular area where the Morrison-Knudsen Company work was being performed? A. Yes.

Q. Yes, sir. And there was no prohibition against their taking their private cars in there if they wished to report for work?

A. I don't believe so.

Q. When did you first tell your workers to go back to work in this area?

A. I think it is documented by telegram when the Ching Panel made their recommendation.

Q. I take it, then, that during that period of time, at least from April 5th on, they were staying out with your concurrence and approval and that of your local? A. Yes.

Mr. DeGarmo: I have no further questions.

The Court: Any cross?

Mr. Etter: No.

The Court: Any questions? That is all, then, Mr. Rossman. [568]

(Witness excused.)

Mr. DeGarmo: I think that completes the plaintiff's case in chief.

The Court: All right.

Mr. DeGarmo: On this feature of the case, if your Honor please.

The Court: Mr. Carey?

Mr. Carey: At this time, if the Court please, plaintiff having rested, on behalf of Teamsters Local 839, I move to dismiss the action upon the following grounds:

First, that the labor contract dated December 19, 1955, effective, as I recall, as of January 1st, 1956, copy of which is in evidence as Exhibit 2, is not shown to have been applicable to work within the Hanford Area, but on the contrary is shown to be work not applicable to that area. And, secondly, that in any event, Morrison-Knudsen Company, Inc., as plaintiff, may not maintain an action for breach of that contract signed only by Associated General Contractors and not signed by the plaintiff Morrison-Knudsen.

Mr. Etter: I will join in that motion on both grounds, with the possible further amplification or statement that I think he mentioned but I want to be sure it is in there, that the plaintiff here is not a [569] signatory party to the collective bargaining agreement involved and upon which the action is brought and it therefore cannot maintain the action under the provisions of 29 U.S.C.A., Section 185 (a), upon which jurisdiction is asserted in this case, and that because of the foregoing, the Court has no jurisdiction. And I want to, with the Court's permission, present some argument at length not only with regard to a number of District Court cases, but with regard to developments in the determination of the substantive character of this statute just decided by the Supreme Court of the United States,

of the judge of the District of Arkansas who wrote the *Ketcher vs. Sheet Metal Workers* case, I wouldn't expect him to take me too seriously unless my reasoning on which my decision or opinion was based appealed to him and he felt that the reasoning and the logic were sound.

The *Ketcher* case and the dicta and the language in other decisions which have been cited here, such as [620] the *Square D vs. Electrical Workers* in 123 F. Supp. 776, is based upon the assumption that, because individual members of a labor union may not be sued in Federal Court under Section 185(a), and from that it follows that the individual members may not maintain suits for violation of labor contracts under Section 185(a), that therefore it follows that employers who belong to and act through an association, unless they directly contract with the labor union, may not maintain a suit under this section. That is the reasoning of the *Ketcher* case. The judge there says that he can't see any difference between the situation of the individual members of a union and the individual members of an employers association. If an individual workman may not maintain the action, then the individual employer may not maintain the action if he acts through and was represented by an association.

It seems to me that this is not a proper construction of the statute and overlooks what Mr. DeGarmo brought out in his argument here, the history and purpose of it in one respect, and that is to enable the courts to take jurisdiction of and to decide a case

for breach of contract against a labor union, which is an unincorporated association as a rule, at any rate, and could not be sued at common law. The language of [621] 185(a) which is the basis of jurisdiction of the District Courts, of course, gives jurisdiction to the courts to entertain suits or to decide suits for violation of contracts between an employer on the one hand and a labor union representing employees on the other. That is the basis upon which the court may take jurisdiction, an employer on the one hand and the labor organization representing employees on the other. That language implies that it is not the individual employees who are to maintain the action or sue or be sued, but it is the organization, but on the other hand it is the employer, and this argument that it would greatly add to the burdens of the District Courts, I can't see where that is a sound conclusion. Certainly, it would greatly increase the number of suits that could be brought if the individual members of a union running into thousands could each bring suits for violation of a contract made in their behalf by their union, but on the other hand it doesn't make any difference how many members there may be in a particular association, such as this Associated General Contractors, whether it has ten, whether it has forty, whether it has fifty, the only member who can bring the action is the employer party to a particular contract as to which it is claimed there is a breach. [622]

So that whether the employers act directly in contracting or act through an association, you won't

have any more lawsuits, you would simply have those lawsuits in which there was a claim by the employer that the labor contract had been breached and the suit was brought by the employer.

I can't see where there is any requirement in this language, or any prohibition, I should put it, against an employer acting through an agent. It has been a good many years since I was in law school, but I remember Professor Goodner used to drum into us the Latin maxim—my pronunciation may not be the best—but *qui facit per alium facit per se*—what one does through another he does himself—and certainly would anyone maintain if Morrison-Knudsen or any other employer executed a power of attorney authorizing John Smith, Bill Jones, or the Associated General Contractors to execute labor contracts for Morrison-Knudsen, that that couldn't be done under this section, that a contract couldn't be made in that way? And it seems to me here that, while it hasn't been done in that formal manner, that there is clearly an agency relationship here and it is not disputed that there is an agency relationship where the Association undertakes to act as an agent for the individual member employers. [623]

And it seems to me, too, that I see no reason why the third party beneficiary principle should not apply to this situation, although I don't think it is necessary to pass upon that point because I think there is an agency relationship here which would bring it within the statute.

Now, that is my opinion. The learned judge from the District of Arkansas, who is an older man than

I am, and who is 73—I haven't reached that ripe age—he has more years on the bench, perhaps he is right and I am wrong, but, of course, his opinion is only persuasive and in the final analysis, of course, if it gets that far, the controlling thing will be what the Ninth Circuit Court of Appeals thinks about this and the way in which the Ninth Circuit Court of Appeals views it. I think that they would have the same view that I have, but I am not basing my opinion on that because I have to decide things as I see them and let somebody else who has the last say say otherwise if they choose.

So that I think the motion should be denied and we will proceed with the defendants' case.

Mr. Etter: Your Honor, for the record, and also hoping that your Honor looks with favor on it, I should like leave to make a motion to amend the answer [624] to the amended complaint by adding to the affirmative defense which was pleaded and move, of course, for the reinstatement of the affirmative defense as pleaded with the amendment which I would like to read to your Honor.

The Court: All right.

Mr. Etter: (Reading:)

“On November 25th, 1955, the plaintiff entered into a contract with the United States Atomic Energy Commission for the construction of certain facilities wholly within the limits of the said area above described acquired by the United States for purposes of national defense, and on or about November 28th, 1955, it commenced the performance

of said work. To perform the work it had to do under said contract, it became necessary that plaintiff employ members of said local unions 839 and 370. For many years prior to the commencement of that work, there had been in full force and effect a certain labor contract negotiated by said Hanford Contractors Negotiating Committee defining the terms and conditions applicable to work within said area, including provisions [625] that the workmen, in addition to stipulated hourly wages, should be paid an additional amount known as 'isolation pay' and should also be furnished bus transportation to and from their particular places of employment within the Hanford area.

"At the time of the commencement of the work, plaintiff agreed with defendant locals 839 and 370 that said Hanford contract should apply to said job until completed and, although termination notice of said contract was made on December 29th, the terms of said contract were applied until after March 20, 1956.

"Beginning about March 8, 1956, the plaintiff sought to apply to said work the provisions of certain other contracts, namely, Exhibits A and B attached to the plaintiff's original complaint, both less favorable to defendants' members; that on or about March 22nd, 1956, the plaintiff definitely refused to abide by commitments and the work stoppage described in the amended complaint occurred and continued until June 6, 1956, when work under the original conditions, including [626] 'isolation pay' and free bus transportation, was resumed.

“The loss, if any, sustained by plaintiff was caused solely by its said refusal to abide by its commitments relating to the payment of ‘isolation pay’ and the furnishing of bus transportation.”

Now, as I gathered your Honor’s ruling yesterday, the Court, although adhering to its original ruling, did hold that we might introduce evidence showing under what arrangement these men were working at the time of the commencement of the Morrison-Knudsen job and facts thereafter, but nothing that would go, as I understood it, to the attempt to vary the two agreements in question by parol.

The Court: Mr. DeGarmo?

Mr. DeGarmo: Well, it was a little difficult for me, your Honor, in view of the length of the amendment, to follow it. Counsel has not seen fit to type out or furnish me with a copy of it. However, the general import of it, as I understand it, is to attempt to reinstate the portions of the affirmative defense which have been stricken and to plead an oral contract of some character entered into prior to the written contract which is in evidence here between the parties, [627] and my objection to it, first, is that the amendment has not been timely made. This matter has been in the courts for substantially over a year, as I recall, or approximately a year. During that time, there was filed an original answer, during that time, there was filed an amended complaint, and there was filed—I requested of counsel whether they desired merely to stipulate that their original answer should stand to the amended

complaint or whether they wished to file a new answer, and they expressed the desire to file a new answer, which they did. That answer, I think the record will show, has been on file for months and months, and it was not until the time of this trial any such a contention as this was ever made.

Now, to permit the amendment at this time would be to deny us the privilege of all of the pretrial procedures which are provided by the Federal Rules of Civil Procedure, such as discovery, interrogatories, the other pretrial procedures, which would determine the facts, and I do not believe that such a motion is timely made.

In addition to that, I submit to your Honor that inasmuch as this so-called oral agreement that they have attempted to plead was preceding, though I—did you state the date? [628]

Mr. Etter: Beg your pardon?

Mr. DeGarmo: I am not sure whether the amendment stated the date.

The Court: What I understood, counsel—of course, I just heard it read once myself—but I understood what he is basing it on is what has come out here in the testimony from various witnesses, at least it seemed to me it has, that in the first place when Morrison-Knudsen entered into this contract with the Atomic Energy Commission, they agreed to abide by the area contract. There is no doubt about that, is there?

Mr. DeGarmo: That's right, there is no question.

The Court: So what he is saying is that the

plaintiff adopted the area contract and, even though it was cancelled, it was cancelled with reservations or provisionally cancelled with the understanding that certain of its terms should continue on, and that by adoption of this contract you were bound by those provisions and were operating under it rather than under the contract negotiated through the Associated General Contractors.

Mr. Etter: That is correct.

Mr. DeGarmo: That isn't the way I read it. [629]

The Court: It doesn't seem to me because you have a contract here that, I think by its terms would apply to Benton County, that the parties couldn't go down there and make a special arrangement as to a part of Benton County that excluded this contract from its operation, and that is what they are undertaking to prove here, I think. Is that correct?

Mr. Etter: That is correct.

Mr. DeGarmo: Your Honor will recall that every time—and I could foresee this coming and I tried to guard against it in every way that I think was possible within your Honor's discretion—I objected every time——

The Court: Yes, I know.

Mr. DeGarmo: ——they asked a question, and it was a continuing objection.

The Court: Well, I am not saying that the evidence came in. If it came in without objection, we wouldn't need a motion.

Mr. DeGarmo: That's right.

The Court: Because the pleadings would be construed to be amended to conform to the proof.

Mr. DeGarmo: I have had this happen to me before where they keep asking the questions and the [630] court lets it in and then the court decides that they have amended by the construction.

The Court: No.

Mr. DeGarmo: But I don't think your Honor is suggesting that. But I want to read from this thing. They didn't furnish me a copy and sometimes the technical language means something. They say the plaintiff at the time of the commencement of the work agreed. That is a contract, that is what they are pleading, the thing that I have objected to constantly, that they were attempting to plead and rely upon an oral contract—or to rely upon an oral contract not having pleaded it. Now they are coming in here after the close of the plaintiff's case, after this case has been at trial for three days, after over a year or approximately a year, and are asking to plead an oral contract.

“Plaintiff agreed with the defendant locals 839 and 370 that said Hanford contract should apply to said job until completed and, although termination notice of said contract was made on December 29th, the terms of said contract were applied until after March 20th, 1956.”

Now, they have pleaded an oral contract——

The Court: Whether they have pleaded it [631] or not, it doesn't seem to me—of course, I am not trying to say what the defendants' position is, I am

trying to shorten this by my giving my understanding of what it is——

Mr. DeGarmo: Yes.

The Court: I don't see that they would have to plead an oral contract between Morrison-Knudsen and the union, because here we have unquestionably a written contract between the Atomic Energy Commission and Morrison-Knudsen that Morrison-Knudsen will abide by the terms of the area contract. Isn't that correct?

Mr. DeGarmo: Oh, yes.

The Court: And the contract made for the benefit of third party unions would be enforceable by them, I should think.

Mr. DeGarmo: Oh, yes, but that agreement also specifically states that we will abide by it only—I would rather read from the contract and then there can't be any question:

“During the life of the Hanford Works Agreement——”

that is the predicate of the whole paragraph——

“During the life of the Hanford Works Agreement, the contractor agrees to pay laborers and mechanics engaged in the work [632] hereunder at Hanford Works the scale of wages and allowances prevailing at Hanford Works as determined by the Commission.”

Now, in order to cover that specific fact, we asked for an admission by these parties that the Hanford Works Agreement, the item here which is mentioned, was terminated as of December 31st, 1955. They have admitted that it was so terminated.

Mr. Etter: As qualified.

Mr. DeGarmo: Well, now, let's read what you admitted.

Mr. Etter: All right, read it.

Mr. DeGarmo: Yes, you admitted that there were continuing negotiations and you have an admission that no subsequent agreement was ever consummated.

Mr. Etter: That's right, read it if you want.

Mr. DeGarmo: Well, I am always willing to read to the Court. I realize that they don't like to admit something that hurts their case and they have tried to qualify it.

Mr. Carey: Do you?

The Court: All right, let's have it.

Mr. DeGarmo: There are two admissions on this so we will read both of them. This is their first answer: [633]

“Answering Request 13, defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 839, Joint Council of Teamsters No. 28, and Western Conference of Teamsters, admit that the contract in force prior to January 1st, 1956, and applicable to the Hanford Works was cancelled as of December 31st, 1955, by notice given by Hanford Contractors Negotiating Committee through Kenneth M. McCaffree, its executive secretary, and that no substitute contract became effective relative to said area——”

Now I am reading the second admission, rather than the first. I will read the other.

The Court: Yes, all right.

Mr. DeGarmo: (Reading continued:)

“and that no substitute contract became effective as to said area between January 1st, 1956, and the date of the work stoppage referred to in plaintiff’s amended complaint, and these defendants deny that the contract attached to plaintiff’s amended complaint as Exhibit A had or has any application to [634] work to be performed within the area.”

Now, you will notice that they say both that it was cancelled and that no substitute contract came into effect. Now, it is true that that request had to do particularly with any contract dealing with health and welfare, but the only contract that could have dealt with health and welfare was the Hanford Works Agreement.

All right, now, the other one. I thought I had these indexed, but I don’t seem to.

Mr. Etter: I think you will find it is the answer to your request number 10.

Mr. DeGarmo: Is it 10 in the same——

Mr. Etter: 10 in the same one, I think, Mr. DeGarmo.

Mr. DeGarmo: That is probably the reason; I thought it was in a separate answer. Yes, number 10. The question which was asked in number 10:

“That at no time since December 31st, 1955, has there been in force or effect a construction collective bargaining agreement covering Hanford Works or the area known as Hanford Atomic Products Operations between the Hanford Contractors Negotiating Committee and any of defendants to this action?”

They say: [635]

“Admittedly, subject, however, to the qualification that between December 31st, 1955, and the date of the work stoppage referred to in the plaintiff’s amended complaint negotiations were being carried on between a committee representing interested labor unions and Hanford Contractors Negotiating Committee for a new contract covering construction work to be performed exclusively within the Hanford area.”

Now, that is quite a different thing than what they are attempting to plead now. They now say that, while this is all true, that there was another contract; this says merely negotiations.

Now, they don’t plead, nor is there any admission—in fact there is an admission that the Hanford Works Agreement, which we were obligated to follow under the A.E.C. contract, was terminated. They say true, there were some negotiations, which we admit that there were, apparently some contractors’ negotiating committee down there was doing some negotiating during that time. Who for, I don’t know. There has been no showing that they ever negotiated for the plaintiff in this action, but they are now attempting to say that [636] during this same period, and I first want to say that that terminates the A.E.C. agreement, we had no obligation from December 31, 1955, under the A.E.C. agreement because it was only binding on us during the life of the Hanford Works Agreement, and there is no controversy in this case whatsoever that the Hanford Works Agreement was terminated on De-

ember 31, 1955. They don't plead and they don't claim that it was, and I am sure there can be no contention about that so far as any obligation under this contract. It ceased as of December 31, 1955. From that time on, the only obligation we had contractually, we claim, was under Exhibits 2 and 3. Now they are attempting to come into court at this time and say that plaintiff, at the time we commenced work, and they don't specify what that date is and I would like to have it specified, if they will, agreed, because if that was a date preceding the execution of these two contracts, I think under the rule that a later written contract covering the subject matter excluded the prior agreement, that it would have fallen. They don't claim that this was in writing; in fact, they don't say what this agreement was, whether it was oral or in writing; they merely say that plaintiff at the time of commencement of work, agreed with the defendant locals that said Hanford contract should [637] apply to said job until completed, and that is in spite of their answer that the Hanford Works Agreement was terminated, and:

“Said Hanford contract should apply to said job until completed, and although termination notice of said contract was made on December 29th, the terms of said contract were applied until March 20, 1956.”

Now, as far as the latter part of that, to show what happened down there, I introduced testimony which I thought we were obligated to introduce for the benefit of the Court to show the negotiations leading up to the breach which occurred as to how

the breach occurred, and I don't think they need any amendment to show what the negotiations were leading up to the breach, but certainly as far as pleading a contract, which they are now attempting to do, I object to it upon the ground that it is not timely made and it must be pleaded. If they are relying on a contract which was made, that is an affirmative defense. They can't come into court under a general denial and say, "True, there was a contract, we admit it, but there was an agreement that it was not to be effective." That is what they are saying. That must be an affirmative defense, it cannot be a general denial, because under their general denial [638] they denied the existence of the contract, if your Honor will remember. If they had admitted the contract and pleaded that that contract, although it was a contract, was not to be in effect, then they would have done it by an affirmative defense and properly so. But they denied the existence of the contract and now they are coming in at this stage, after having denied it all the time up until this minute, and saying, "All right, we say that you agreed it wasn't to be effective."

Now, it seems to me that there has got to be some consistency in pleading and there has got to be a time when pleadings are made up. As I say, to answer this so-called agreement, we certainly should have had the benefit of all the pretrial procedures which would have permitted me to take depositions from these people that they are going to try and put on the stand to testify as to this and to give me an

opportunity to bring witnesses here. There were many people at these meetings and I don't know what they are attempting to produce, but I am telling your Honor that this is not timely made and we certainly object to it upon that ground.

The Court: I think that Mr. DeGarmo's position certainly would be well taken under ordinary circumstances, that the amendment had not been timely made, [639] but we have the situation here which is certainly unusual in that the defendants set up affirmative defenses that the contract negotiated through Associated General Contractors didn't apply to the Hanford Area for the reason that the parties didn't intend it to apply, and that, I presume, would have contemplated practically the same testimony and evidence that will be adduced in support of this proposed amendment; that is, if the affirmative defenses had been permitted to stand and anything that would indicate in the dealings with the parties or in their conferences that it wasn't the intention of the parties that this contract should apply to the Hanford Area, but that some other different arrangement had been made under which they were working, then that would be admissible, of course, under that affirmative defense. That motion to strike the affirmative defense, or certainly motions directed to the sufficiency of the affirmative defense, was argued and the Court denied the motions and indicated in the order that he thought it would be preferable to hear the evidence rather than to pass upon the question on the pleadings, so that defense counsel had every right to assume that they would be

permitted to put on their evidence and came here prepared to put it on, I assume, and, conversely, counsel should have been prepared, no [640] doubt was prepared, to meet that evidence.

Mr. DeGarmo: I was and am, but that is not the evidence that we are talking about here.

The Court: It would be substantially the same, it seems to me. I can't see where it would vary very much. All that they are proposing to prove and what they have brought out on cross-examination would have been pertinent to their affirmative defense and it is likewise pertinent to their contention that there was a different arrangement down there, that you didn't apply this contract to the job on the Hanford Works. That is the gist of their defense, as I see it.

Mr. DeGarmo: Might I have the privilege at this time of your Honor that I think I would have had had this been timely made, to ask that before the Court consider it, the parties state in their amendment when this alleged agreement was made?

Now let me point out the difference between what your Honor has indicated here and what the fact is. Your Honor has indicated that the same testimony would be presented to show that the parties never intended to have this Exhibit A or Exhibits 2 and 3 apply. That would necessarily relate to the area preceding the execution of those contracts. Necessarily, if they never intended, it would have to relate to the period [641] preceding.

The Court: Oh, come, Mr. DeGarmo, you mean to say that you can't show the intention in making

a contract by showing the conduct of the parties after the contract was made? Do you think you would be shut off from one of your representatives saying, "Why, no, of course we didn't intend this contract to apply to the Hanford Area, just forget about the contract." If that was made after the contract was executed, under your theory, it would not be admissible.

Mr. DeGarmo: If it was an agreement made afterwards, I agree. If it was an agreement made afterwards.

The Court: No, what I am talking about is, if the party says this contract wasn't intended to apply to a particular job, which, of course, has to be done after the contract was made, certainly they can show the conduct of the parties after the contract to show that they never intended in the first place that it should apply. And perhaps I am wrong about that, but I don't think so.

Mr. DeGarmo: I think your Honor should reconsider that statement, because you are flying right square in the face of the parol evidence rule. The contract says what it intended. No. I agree—— [642]

The Court: No, I am not talking about the parol evidence rule. We are not varying the terms of this contract. The contract is there, what it means is one thing——

Mr. DeGarmo: That's right.

The Court: ——but do you mean to say the parties can make a contract and then by conduct or mutual understanding never operate under it at all,

operate under something that is entirely different, and then come back after the whole situation is over and say, "Although we are without a contract, we are enforcing our contract and you can't vary it by showing we didn't live up to it or didn't try to apply it?"

Mr. DeGarmo: I don't think your Honor and I have any argument about that, that if they can show that the parties did not apply the contract, and your Honor has indicated that——

The Court: How can they best show that the parties didn't apply the contract than by showing that some other entirely different arrangement was followed out inconsistent with the contract?

Mr. DeGarmo: Well, what I am trying to say to your Honor——

The Court: All right.

Mr. DeGarmo: ——is that I came here prepared to [643] show that in the negotiations leading up to the consummation of this contract, these two contracts, Exhibits 2 and 3, there was no intention—in fact, it was the intent of the parties that they should apply. Now counsel for the first time has at this stage attempted to plead an agreement. Now, obviously, that agreement had to be made at some time when there were persons present on behalf of Morrison-Knudsen Company and perhaps other parties. I don't know when the agreement is made. All I have asked your Honor at this point is if I am not permitted the same rights that I would have before if this had been made timely, to have them state in their offer for amendment when this agreement was

made in order that I can argue the question as to whether it was before or after. They must know when this agreement that they are relying upon was made. I think I am at least entitled to that.

Mr. Etter: My position is based right on his own complaint. He says that they entered into the performance of this A.E.C. contract, I think it was on the 28th day of November. The contract that they have with the A.E.C. agrees, as Mr. DeGarmo has admitted, to conform to the Hanford Works Agreement.

Mr. DeGarmo: As long as it is in effect.

Mr. Etter: As long as it is in effect. Now, [644] the date, if you want to know the date that you became bound to pay under the Hanford Works Agreement, it is the same date you say you went to work down there.

Mr. DeGarmo: That isn't what I am asking; I am asking the date of this agreement that you set up in this proposed amendment.

Mr. Etter: Well, I will say, furthermore, that our proof will show that you reiterated and you repeated your agreement under which you were working on the 5th day of January.

Mr. DeGarmo: Well, is that the date of the agreement that you are referring to?

Mr. Etter: I am referring to both of them. You, yourself, automatically became bound on this contract to be under the Hanford Works Agreement.

The Court: Well, I think——

Mr. Etter: And it was on January 5th that you

reiterated that you were and that you would continue to be. Now, I can't make it plainer.

The Court: I think if the amendment is allowed, that it should be typed out and a copy handed to Mr. DeGarmo and then he can make motions to make a more definite statement, if he cares to do so.

Mr. DeGarmo: I would like to ask this of your Honor. I don't wish to quarrel with your Honor about [645] your ruling if you are going to permit them to do this——

The Court: Well, I never dodge an argument. If you want to argue, I will argue with you, but you have been doing it pretty well so far, I think.

Mr. DeGarmo: No, sir, I don't wish to argue, but I merely wish to state, if your Honor please, that during the course of the testimony if it appears that they are producing evidence on an area where we do not have the witnesses available here, certainly at that time I will expect to request the Court that a continuance be granted in order that we may have an opportunity to meet the testimony, and I think that that is something that I should be entitled to some consideration on at that time.

The Court: Well, the Court has just got to the point, I believe, of trying to explain why the Court thinks that the matter of requiring timeliness here doesn't apply to this particular situation; that what I was saying was that, in view of the Court's changing its ruling on the motion to strike, and I am not receding from that, I think that I was justified in doing it because of the statement of counsel for the defense that that was what they proposed to show

here, and that the affirmative defenses adequately and fully stated their position, but that doesn't alter the fact [646] that the defendants came here expecting their affirmative defense to stand, at least through the trial, and to have an opportunity to present evidence in support of it, and the changing of that situation was the Court's doing, not theirs. So that they have been put in this position where you couldn't say that an amendment wasn't timely, because the situation was changed on the outset of the trial.

Now, I think that one thing that perhaps impresses me and that is that counsel on both sides, I think, are placing too much emphasis on the pleadings, and I will include in that the interrogatories and the answers. The interrogatories and answers have no higher status than the pleadings in the case, and even though admissions may be made in there, if counsel thinks it is in the interest of his client and in accord with the actual facts and the testimony and the evidence that is to be adduced, he has a right to ask for an amendment, regardless of whether it is consistent with his prior pleadings or consistent with his prior admissions, and the whole spirit of modern trial work, as outlined in the Rules of Civil Procedure, is to have lawsuits tried and decided on the evidence and not on the pleadings, which are simply a statement of counsel at various stages as to what they think will be proven, as to what [647] they think the evidence will be, and that is certainly made very clear by Rule 15 of the Rules of Civil Procedure,

which not only provides that if evidence comes in without objection, the pleadings shall be construed to be amended to conform to the proof, but also I think it gives to the trial judge a very clear injunction to be very liberal in the matter of allowing amendments to the pleadings, and in rule 15 (a) it points out what amendments may be made without order of court and then, otherwise:

* * * "A party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Then again down in 15 (b) is the provision, as I have said, that if the proof comes in without objection—doesn't apply here, of course—then the pleadings shall be construed to be amended to conform to the proof. But even if objection is made, you find this provision in 15 (b):

"If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of [648] the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Now, it may be I will not dispute Mr. DeGarmo on that because he knows his position in this lawsuit better than I do. It may be that evidence other than

would have come in under the affirmative defenses will be necessary to support this proposed amendment, but it seems to me in general outlines there isn't a great deal of difference as to the position here as to whether this contract was actually applied to this particular job on the Hanford Works and the parties were operating under it or were operating under something else, and we have, too, this situation, that it isn't as if Mr. DeGarmo would be called upon this afternoon to meet evidence which is brought in under an amended pleading. We certainly will not conclude this case today. It looks as if we would do well if we would get through with the arguments by 5 o'clock this afternoon the way we are going. But this case will have to be continued over until next week and probably, I should think, will [649] take most of next week, so that counsel will have from Thursday night until Monday morning to get such additional evidence as may be necessary to meet whatever new evidence or proof may be brought in, and, of course, the Court will entertain at any stage a motion for continuance. Not saying that I will grant it, but I will consider it if counsel thinks that he should have a continuance.

Mr. DeGarmo: I wish to state at this time, in order that the record may be clear on the subject, that I conceive that one of the very material witnesses to the issue which they are now attempting to present will be a Mr. Henry Thurston, who at that time was with the Atomic Energy Commission and now is in Washington, D. C., and will be unavailable for the purpose of this trial. I would have

had to take his deposition in order to meet this evidence. I merely want to state that because later it may be used as the basis for asking for a continuance.

I would like to ask this further indulgence by the Court, as I understood Mr. Etter to state when he made this motion that he was asking to reinstate all of the allegations of the stricken affirmative defense. Now, I don't know what allegations. I tried to follow this, but he read it so fast I couldn't, and if there are [650] certainly any allegations in there which have already been stricken, it doesn't seem to me that they would be proper.

The Court: Well, I didn't construe his motion to mean that he is asking now to prove or to bring in proof as to what was intended by the written contract or that this language means other than it indicates.

Mr. Etter: I specifically made it clear that I was aware from your Honor's ruling that the Court would not allow me to introduce evidence prior to the initiation of the contract of the Associated General Contractors and during their negotiations to prove or vary it by any parol testimony; that your Honor's ruling applied only to my showing a course of conduct under a contract other than the contract that is in dispute. I understand that was the Court's ruling and that is all I intend to do.

Mr. DeGarmo: My only point is this, if your Honor please, and then I will cease talking.

The Court: Yes.

Mr. DeGarmo: That if by this amendment, not

objecting to it at this time since I don't know its specific language, I will object at the time any evidence is offered which would seem to be in support of the allegations of the original affirmative defense, [651] and if that may be considered as not being a waiver if they have pleaded in this thing anything which is in that affirmative defense, I don't want to waive the right to move to strike it.

The Court: Well, the record will show your objection here, of course, to the amendment and then, if you wish, you may object to offer of proof under the amendment. Of course, Mr. DeGarmo has adequately preserved his record here and the Court has tried to assist in that. I think that is what you should do and you have objected all along to this evidence, but we have had protracted cross-examination which, as I see it, was in support of this defense, in substance, anyway.

Mr. Carey: Yes, that is correct.

The Court: And that has been going on for a couple of days here.

Mr. Carey: One hour, your Honor.

The Court: All right.

Mr. DeGarmo: Over my protest.

The Court: Oh, yes, I prefaced my remarks by saying that, that you have kept your record very adequately by objecting.

I assume that counsel doesn't want to at this stage, but in the formal amended pleadings and the amendment, if stated to your satisfaction here, I suggest [652] that the reporter, perhaps during the

noon recess, transcribe it and then you can polish it up, if you wish.

Mr. Etter: What I was going to do, your Honor, was have it typed, because I want it, and I will hand a copy to Mr. Oden when I return and also to Mr. DeGarmo.

The Court: Yes, all right. Court will recess for ten minutes.

(Short recess.)

The Court: Before we proceed, I think the Clerk mentioned that according to his minutes here there was some statement made by Mr. Etter to the effect that he was moving to reinstate the affirmative defenses with certain additions. Now, I didn't mean by my ruling to permit the reinstatement of the affirmative defenses——

Mr. Etter: I understand you didn't.

The Court: ——and I will not take that position. I think I made my position clear on that.

Mr. Etter: Yes, and I won't assume that you did.

The Court: Yes, all right.

Mr. Etter: I want to call Mr. Knapp.

The Court: Which I might say means, according to the Clerk, Mr. DeGarmo, that you were right and I was wrong on that matter. [653]

Mr. DeGarmo: No apologies are necessary.

The Court: All right.

CHARLES J. KNAPP

called and sworn as a witness on behalf of the defendants, was examined and testified as follows:

Direct Examination

By Mr. Etter:

Q. You are Charles J. Knapp?

A. Yes, sir.

Q. Where do you live at the present time, Mr. Knapp? A. Pasco, Washington.

Q. Pasco, Washington. And how long have you lived at Pasco, Washington?

A. Since May of 1943.

The Court: Pardon me, to save time here, Mr. DeGarmo, if you wish, the record may show that you object to all the testimony that may be adduced here in support of the amended affirmative defense, and, of course, I don't wish to relieve you of the responsibility of making individual objections if for some other reason than that you are not conceding that the affirmative defense should be allowed, that you should state that separately when the question is asked.

Mr. DeGarmo: I appreciate that, if your Honor please. [654] That will shorten the time considerably if we may so understand.

The Court: Yes, all right.

Mr. DeGarmo: I didn't think, since they were only asking his name and address, that I was in a position to do it.

The Court: No, all right.

(Testimony of Charles J. Knapp.)

Mr. Etter: Two more answers than some people have been getting, at that.

Q. (By Mr. Etter): You have lived in Pasco since about 1943, you say? A. Yes.

Q. And what has been your occupation, Mr. Knapp, while you have been there?

A. Union representative for Plasterers and Cement Finishers.

Q. And have you also been acting or have you acted during that time as a representative of what is known as the Building Trades Section?

A. Yes.

Q. Of the American Federation of Labor?

A. The Secretary of the Building Trades Council.

Q. Of the Building Trades Council. And how long have you been secretary of the Building Trades Council?

A. In two different times now. Just this last year, then I think about five years on another time. [655]

Q. At another time? A. Yes.

Q. And you were living in Pasco, were you not, at the original inception of the construction and otherwise of what is now known as the Hanford Works? A. Yes, sir.

Q. And have you been familiar with the Hanford Works from the labor end since 1943?

A. Yes.

Q. And have testified, I think, at other times in this Court, have you not?

(Testimony of Charles J. Knapp.)

A. In the Federal District Court, yes.

Q. Yes. On the various aspects of the Hanford Works? A. In Yakima.

Q. In Yakima. Now, in 1955, and I have reference now to the months of November and December particularly, at that time was the defendant union, Engineers Local 839, a member of the Building Trades Section of the American Federation of Labor? A. Yes.

Mr. DeGarmo: 839?

Mr. Etter: I said Teamsters 839, isn't that right?

Mr. Carey: The Engineers 370 and Teamsters 839.

Mr. Etter: Teamsters, oh, yes. [656]

Q. Teamsters 839, were they members?

A. Yes, they were.

Q. And were the Operating Engineers, Local 370? A. Yes, sir.

Q. Now, that Building Trades Section of the American Federation of Labor is a chartered federation, is it? A. It is.

Q. It is chartered. When did you receive the charter for that local federation?

A. I think that charter—oh, it is several years old. Long before 1943. I think perhaps in about—I believe the date on it is 1939.

Q. 1939. And this is the charter that you refer to under which this Building Trades Section operated in Pasco and that area?

A. It is the Building Trades Council, an af-

(Testimony of Charles J. Knapp.)

affiliate of the Building Trades Department of the A. F. of L.

Q. Of the A. F. of L. And included about how many unions, approximately?

A. It varied from 15 to about 19.

Q. Fifteen to about 19? A. Yes.

Q. Were those unions or many of them or a percentage of them engaged in work on the Hanford Works Project in the months of October, November and December of 1955, do [657] you know?

A. There were not so many employed during those three months.

Q. I see. Have members of those building trades unions been at all times employed on the Hanford Works?

A. During the construction, they have all been employed there.

Q. They have all been employed?

A. Yes, sir.

Q. And you do not know how many of the various crafts were employed on any construction within the Hanford Works Project during October, November and December, 1955?

A. No, I can't give you that figure, I don't know it.

Q. You do not know it. Now, at that time did you also represent an individual or a particular union other than act as secretary of the Building Trades Section?

A. I have been a representative of the Cement Finishers since 1943. I represented them, yes.

(Testimony of Charles J. Knapp.)

Q. I see. Were you the secretary in 1955?

A. Not in November of '55.

Q. Not in November? A. No.

Q. When did you become secretary again?

A. In July of '56.

Q. In July of '56. And you had been secretary before? [658] A. Yes.

Q. At what time?

A. Well, I think from about '45 through—oh, on through, I believe, until '52.

Q. '52? A. I think so, about then.

Q. Now, in November and December of 1955, did you have any contract of any kind directly with the plaintiff, Morrison-Knudsen Company?

A. No.

Q. Beg your pardon? A. No, sir.

Q. You did not. Did you at that time, in October, November, or December, let's put it, of 1955, have any contract or collective bargaining agreement with the Associated General Contractors, Heavy Highway Chapter?

A. The union that I represent was not under agreement to the A.G.C.

Q. They were not?

A. That is, the Heavy Highway.

Q. Now, during October, November and December of 1955, were any of the men in your union, that is, the Cement Finishers, employed by any contractor on the Hanford Project

A. Yes. [659]

Q. Do you know how many?

(Testimony of Charles J. Knapp.)

A. There were very few. I think perhaps as many as 8 or 10.

Q. At that time? A. Yes.

Q. And could you tell me during the year, 1955, if you know, about how many of your craft and in the union you represented were employed on the Hanford Works?

A. We may have had as many as 30.

Q. As many as 30? A. Yes, sir.

Q. In October or November or December, did you have any employees working on the project for Morrison-Knudsen on their particular contract?

A. I think not, I don't think so, in '55.

Q. You don't think so?

A. No, sir; I know we didn't.

Q. But you did have a number working on the project for other contractors at that time?

A. Yes, sir.

Q. I see. How were they being paid at that time while they were on the project?

Mr. DeGarmo: Just a minute, now, Mr. Knapp. I fail to see where that has any materiality to any of the issues in this case or to any issue of this [660] affirmative defense.

Mr. Etter: Well, I am merely showing——

Mr. DeGarmo: What they were being paid by other contractors.

Mr. Etter: Well, I merely intend to show that they were being paid under the Hanford Agreement. It is preliminary to other questioning that I have following January the 1st when they became

(Testimony of Charles J. Knapp.)

employed by your company. If that is permissible.

The Court: Well, all right.

Mr. DeGarmo: If it is just preliminary, I was waiting to find out.

The Court: I assume that it is.

Mr. Etter: Yes, it is.

Q. Were members of yours—let's put it that way so we can get to it—working at that time, October, November and December, under the Hanford Agreement? A. They were.

Q. They were. And in connection with that, they were being paid isolation pay?

A. They were.

Q. And were they being supplied bus transportation? A. They were.

Q. They were. Now, but none of your people during 1955, as I understand it, and I am referring particularly to [661] these three months because they involve other factors, none of them were working for Morrison-Knudsen?

A. They were not.

Q. They were not. Now, were you aware shortly after December the 29th of a letter written by Mr. McCaffree, who was the secretary, apparently, of the Hanford Contractors Negotiating Committee, were you aware of a letter written by him to the respective unions?

A. Yes, I got a copy, I got a letter from him.

Q. Did you receive—was that a copy or a letter the same as we have referred to here and was read?

A. Yes, sir.

(Testimony of Charles J. Knapp.)

Q. And you have had a chance to look at it?

A. Yes, sir.

The Court: Is that the cancellation letter, is it?

Mr. Etter: Yes, your Honor.

The Court: That is in evidence, isn't it?

Mr. Etter: Yes, it is.

The Court: And it is the one the employers wrote?

Mr. Etter: I think it is attached to a pleading.

Mr. DeGarmo: Yes.

The Court: Well, all right.

Mr. DeGarmo: It is in the requests for [662] admissions.

Q. (By Mr. Etter): Now, thereafter, did you make any arrangement for a meeting with any representatives of Morrison-Knudsen?

A. Well, we had a meeting on January the 5th that was called by the Building Trades Council and I attended that.

Q. I see. Is that the meeting at which Mr. William Dunn, a representative of the Operating Engineers, was present? A. Yes, he was there.

Q. And was a representative of the Teamsters present, do you recall, at that time?

A. I'm not sure, sir, about the Teamsters. I thought that Sewell Davis was present, I have been corrected since, so I'm not sure who was there.

Q. I see. You are acquainted with Mr. Edward Clarey? A. Yes.

Q. And was he there? A. Yes, he was.

Q. And was Mr. King?

(Testimony of Charles J. Knapp.)

A. Mr. King was there.

Q. Mr. Rossman? A. Mr. Rossman, yes.

Q. And numerous others were there?

A. Yes, about 15, I think. [663]

Q. About 15. Were those men representatives of the individual crafts that compose the Building Trades Federation and Section? A. Yes, sir.

Q. They were. And was anybody there representing Morrison-Knudsen that you recall?

A. Mr. Lee Knack and Mr. Reed were present.

Q. Mr. Lee Knack and Mr. Reed? A. Yes.

Q. I gather from the testimony that this was held in the labor hall at Richland?

A. No, at Pasco.

Q. At Pasco, excuse me. I think Mr. Knack said that it started around 2:30 and extended until close to 5:30, when he had to go and take a plane. Would that be a fair statement of the time?

A. I think he is right.

Q. And why did you call that meeting? What was it called for?

A. The Building Trades Section called the meeting, which was a usual thing for a pre-job conference so that we might discuss many matters between various unions and the employer in reference to the manpower needed and about what time he would start, various different phases of his work, what his policy would be in hiring, and, oh, [664] it is just a conference that is nearly always held when a major job is being started.

Q. It is a matter generally, then, of coordination, is that right? A. Yes.

(Testimony of Charles J. Knapp.)

Q. Between the unions and the contractor who is going to employ the men? A. That's right.

Q. Now, during that conference or during that discussion, did you have any occasion to discuss with, and if you did, name the person, a representative of Morrison-Knudsen, the matter of the conditions of employment on the Morrison-Knudsen job within the Hanford area?

A. Yes, we had. There was much said about the employment, how many men would be employed of each craft, and about when they would be employed. Yes, there was much conversation in reference to that.

Q. All right, and then was there some conversation with respect to the matter of the wages and other conditions of employment?

A. Well, the wages were fixed. They had our Schedule A——

Mr. DeGarmo: If your Honor please, I believe that I am entitled to ask, and I do ask, that on a subject which is as important as this that the witness be requested to give exact conversation, if it is possible [665] for him to do so.

Mr. Etter: All right.

A. I will do the best I can.

The Court: In substance, yes. Of course, you couldn't remember the exact words.

Mr. Etter: All right.

The Court: But as nearly as you can.

Mr. DeGarmo: The exact words may be very important.

(Testimony of Charles J. Knapp.)

The Court: State the conversation and identify the person who made the statement.

Mr. DeGarmo: In this case, the exact words may be very important.

The Court: Well, if he can remember them, certainly.

Q. (By Mr. Etter): Keeping that in mind——

A. Yes, sir.

Q. ——Charlie, and if you can remember who said what and the exact words or, as his Honor says, as closely in substance, if you will do that. Did you during the conversation make some statement to Mr. Knack or to some Morrison-Knudsen representative that you recall?

A. The meeting was under the chairmanship of Mr. Dunn and Mr. Bud Shirk was the secretary, and I was sitting there just as a member of the Council. I had very few [666] questions of my own to ask during the main part of the meeting. However, there was two points of interest, they were the only two that I was particularly interested in, and that was what the company intended to do in reference to furnishing transportation for their employees and the payment of isolation pay. I was particularly interested in them two points.

Q. Did you have some conversation about that?

A. Well, after the general meeting, I told Mr. Knack that there was two points that I was particularly interested in and I would have to have the answer for the people that I represented, what Morrison-Knudsen was going to do if the Hanford

(Testimony of Charles J. Knapp.)

Contractors Committee carried out what they had said they might do. That would be the discontinuance of both items. What they would do. Do you want the answer?

Q. Yes.

Mr. DeGarmo: Just a minute, Mr. Knapp. I don't like to interrupt the witness in the middle of his answer; however, from the statement which the witness has now made, I object to the answer being given upon the ground that it would be entirely incompetent and irrelevant and immaterial to any issue in this case, inasmuch as he has testified that he was the business agent at that particular time only for the Cement [667] Finishers and he stated he was only interested as to his particular craft. Therefore, any statement that may have been made to him regarding his craft would have no relevancy as to the Operating Engineers and the Teamsters.

The Witness: May I add one little thing to that?

The Court: Well, all right.

The Witness: To the statement I just made?

Mr. DeGarmo: I have made an objection.

The Court: Well, I should rule on the objection first.

I should assume in a situation of this sort the representatives of labor would be acting jointly and not representing simply their individual craft, so I will overrule the objection.

Mr. DeGarmo: If your Honor will remember, he was not at that time other than secretary of the Cement Finishers.

(Testimony of Charles J. Knapp.)

The Court: Yes, the thought that I had in mind was, Mr. DeGarmo, here is a meeting that is called, a pre-job conference with the contractor who is going to employ labor, representatives of a number of the crafts are there. If the representative of the employer is authorized to speak for him, what he says there, I should [668] think, would be binding on all, would be binding upon the employer as to all the employees there, as to all the unions, and not that he promises one one thing and another another. For instance, I shouldn't think it would be necessary if a representative of one craft says, "Are you going to furnish transportation and isolation pay?" and the answer was "Yes," I don't think it would be necessary for everyone there to say, "Are you going to furnish it to the Engineers, to the Teamsters?" I wouldn't think that that would be necessary to bind the employer.

Mr. DeGarmo: I think it would.

The Court: Okay.

Mr. DeGarmo: Because certainly none of these unions permit anybody else to negotiate for them; they each negotiate their own contracts.

The Court: Unfortunately, we disagree on that, Mr. DeGarmo.

Mr. DeGarmo: And he had predicated his testimony by the statement that this occurred after the general meeting.

The Court: Oh——

The Witness: I'm sorry, sir, I think——

(Testimony of Charles J. Knapp.)

The Court: Well, that is a different matter.

The Witness: —Mr. DeGarmo misunderstood.

The Court: If it was some conversation he had in the hall or in the washroom with a representative of M-K, that is a different matter, but I understood that it was a part of this conversation, pre-job conference that was called where the unions were negotiating with the employer.

Mr. DeGarmo: Might I ask the reporter to read that?

The Court: All right.

Mr. Etter: Let me ask a question. He may have said it was the tag end of the meeting, but was it during the meeting? A. Yes, sir.

The Court: Well, I will overrule the objection.

Q. (By Mr. Etter): All right, who was present at the time you asked this question?

A. I think nearly all of them were still in the room when the question was asked. I was actually the spokesman, if I am permitted to say so. The three unions involved had determined at the early part of the meeting or before the meeting that that question would have to be asked about those two items, and I didn't ask the question until the regular conference, the usual conference, was over with and then I asked the question because, as you might say, a spokesman for the three so that the three [670] different ones wouldn't need to ask it.

Q. You are referring to the Engineers——

A. To the Teamsters—I talked with Mr. Sewell Davis, who was then a representative for the Team-

(Testimony of Charles J. Knapp.)

sters, previously, and I also talked with Mr. Dunn and Mr. Rossman, and I was the one who asked the question of Mr. Lee Knack.

Q. All right, and when you asked the question, did you direct it to Mr. Knack? A. Yes.

Q. And what did he say?

A. He said that they would pay isolation pay and continue to furnish transportation. He said that the Morrison-Knudsen Company had bid the job planning on paying isolation pay and furnishing transportation; that was the way they figured the job.

Q. Did he say anything about the continuance of the job? A. Well, that was——

Mr. DeGarmo: I object to that question upon the ground it is leading. I think we should have the testimony from the witness.

The Court: I think it is a leading question.

Q. (By Mr. Etter): What else further did he say, then, if you recall, about this job?

A. Well, I made reference again to the possibility that the contractors, Hanford Contractors Committee, might do as [671] they had said they might do, just chop it off, and Mr. Lee Knack again said that Morrison-Knudsen would pay isolation pay and furnish bus transportation.

Q. All right. Now, thereafter and after January the 5th, did members of your union work on the Morrison-Knudsen Company job in the Hanford area? A. Yes.

(Testimony of Charles J. Knapp.)

Q. And did they continue to work there until March? A. That's right.

Q. At the time of the work stoppage?

A. Yes, sir.

Q. Do you recall how many men of your craft worked out there, if you recall now?

A. I think there may have been about three or four. I am not sure about the number, I don't think there was over four employed at the time.

Q. I see. Did they work under the same agreement with Morrison-Knudsen as they had worked in 1955? A. Yes.

Mr. DeGarmo: Just a minute, just a minute.

That calls for the conclusion of the witness.

Q. (By Mr. Etter): Well, all right, let's put it this way——

The Court: Yes, I think it does. I will sustain the objection.

Q. (By Mr. Etter): Did they work under the same conditions [672] in pay?

Mr. DeGarmo: I object to that upon the ground it calls for the conclusion of the witness. The question is what conditions did they work under. That covers a multitude of things. The Court would never know what the conditions were.

The Court: Yes, I think it would be best to have the witness detail what the conditions were in 1955 and what they were afterward.

Q. (By Mr. Etter): What were the conditions obtaining under the Hanford agreement in 1955 as far as your union was concerned?

(Testimony of Charles J. Knapp.)

A. Our wages at that time was \$2.90, I think, and they received that pay. They received \$2.62½ isolation pay both in '55 and '56. They also had free bus transportation available in '55 and up to the work stoppage and have since on the job.

Q. Were there any other factors that you recall under which your men were working in 1955?

A. Well, the wage schedule was uniform up to the time—yes, the same wage schedule with fringes. The grinding pay, premium pay for grinding, \$1.58 was payable in '55 and also '56; and swinging scaffold pay, bo'sn chair pay; and the journeymen's wage, the foremen's rate, all those were uniform. [673]

Q. I see.

The Court: This isolation pay, was that for work behind the barrier in the Area?

A. Yes, sir.

Q. (By Mr. Etter): The isolation pay was for what they call behind the barrier?

A. Yes, sir.

Q. I see. When your men worked for Morrison-Knudsen, will you tell what the situation was with regard to the arrangement under which they worked then?

A. You mean after January 1st?

Q. Yes.

A. They continued to work—I mean to say, when they started to work, they worked under the same conditions as they would have worked in 1955.

(Testimony of Charles J. Knapp.)

Q. I see. In other words, you are talking now and saying that was with respect to pay and these things that you have mentioned?

A. Yes, sir.

Q. And, likewise, it is with respect to isolation pay and with respect to bus transportation?

A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. All right. Did you attend any of the meetings with the [674] Hanford Contractors Negotiating Committee between the latter part of December and the time of the work stoppage?

A. I don't think I missed many, possibly not more than one or two.

Q. I see.

A. Of the meetings that I was interested in. They met, there was some meetings held with unions on other business that I didn't attend, but those meetings that included the Teamsters and the Operators, I attended most of them.

Q. In other words, where there were meetings with the Hanford Contractors Negotiating Committee, they were, as I understand it, usually held with your union, the Teamsters, and the Engineers?

A. That's right.

Q. Is that correct? A. I attended those.

Q. Do you recall, Mr. Knapp, how many of those meetings, if you can remember, were held between the latter part of December, say after December 31st, and prior to the date of the work stoppage, which was March 22nd, 1956?

(Testimony of Charles J. Knapp.)

A. I don't remember how many. There were very few. There was some little informal meetings, discussions. There was very few meetings held.

Q. Could you tell me whether or not usually the same [675] people were present at the meetings?

A. Yes, that is true.

Q. And who would be there on behalf of the three unions to which you have reference, that is, the Engineers 370, Teamsters 839, and the Cement Finishers?

A. Well, Sewell Davis, of course, attended as a rule or sent his assistant, Mr. Lewis, or Mr. Griffin. I didn't have any assistant so I had to attend all of them.

Q. I see.

A. But William Dunn represented the Operating Engineers and Mr. Rossman, I believe, attended two or three meetings after December 31st with us.

Q. I see. Now——

A. And Mr. Hollingsworth was also at a meeting or two.

Q. Mr. R. L. Hollingsworth? A. Yes.

Q. Now, Mr. Sewell Davis is now deceased, is that correct? A. That's right.

Q. He passed away about the middle of 1956?

A. Yes.

Q. And his place has been taken by Mr. Bob Lewis and he is here? A. That's right.

Q. Is that correct?

A. That is correct. [676]

(Testimony of Charles J. Knapp.)

Q. Now, at any of these meetings with the Hanford Contractors Negotiating Committee after the end of December and prior to the work stoppage of March 22nd, was there at any time ever any representative of Morrison-Knudsen present?

A. Mr. Reed was present at some of the meetings. I don't know how many, but he was present at some of the meetings.

Q. Mr. Reed, who is the project manager——

A. Yes, sir.

Q. ——for Morrison-Knudsen?

A. Yes, sir.

Q. And the same Mr. Reed who testified here the other day? A. That's right.

Q. Who other than Mr. Reed attended those meetings on behalf of the Hanford Contractors Negotiating Committee?

A. Well, Mr. McReynolds of the J. A. Jones Company.

Q. Mr. McReynolds——

Mr. DeGarmo: Just a minute. That question that was asked, I don't want the record to stand as it is without showing an objection. The question was, "Who else other than Mr. Reed attended the meeting on behalf of the Hanford Contractors Negotiating Committee?" which creates the inference that Mr. Reed was a member of the Hanford Contractors Negotiating Committee. [677]

Mr. Etter: I agree with Mr. DeGarmo and I think——

(Testimony of Charles J. Knapp.)

The Court: It will be understood that the question is corrected accordingly.

Mr. Etter: That's right, yes.

Q. What I meant to say, was Mr. Reed there?

A. Yes.

Q. Then there were certain other men there who represented or were representing the Hanford Contractors Negotiating Committee? A. Yes, sir.

Q. And you named one of these men as Mr. L. E. McReynolds? A. Yes, sir.

Q. And Mr. McReynolds was who?

A. He is project manager for the J. A. Jones Company. They have minor construction at Hanford.

Q. Mr. McReynolds for the J. A. Jones Company? A. Yes, sir.

Q. You were here yesterday when we were advised that the J. A. Jones Construction Company during that time was also a member of A.G.C?

A. I heard.

Q. Mr. Guess told us about that?

A. I heard that yesterday, yes, sir.

Q. This is the same J. A. Jones Company that Mr. McReynolds—— [678] A. Yes, sir

Q. Yes. And he was sitting there as a member of the Hanford Contractors Negotiating Committee?

A. We were told that he was a member, he had been a member before on the committee, and——

Q. But he sat in on these meetings?

A. Yes, sir.

Q. Who besides Mr. McReynolds?

(Testimony of Charles J. Knapp.)

A. Well, there was Mr. Cochran, who was project manager for the L. H. Hoffman Company, and Mr. McCaffree, the executive secretary.

Q. Mr. McCaffree, is that correct?

A. Yes, sir.

Q. I see. Do you recall that the personnel of that committee changed other than these three men or were there more?

A. It changed quite a little because there was so few contractors on the project at the time.

Q. I see. A. They were of the principals.

Q. I see. And so it was Mr. McCaffree, Mr. Cochran, and Mr. McReynolds, as I understand it, is that correct?

A. I believe Floyd Garrett was there a few times with the Sound Construction in the early part of the negotiations.

Q. Floyd Garrett of Sound Construction? [679]

A. Yes.

Q. I see, in the early part of the negotiations.

A. But Sound Construction finished up their job and I think Floyd was only there a few times.

Q. Can you tell us generally what these discussions concerned?

A. Yes, the Hanford Contractors Committee were trying to get us to agree that the A.G.C. contract was the better agreement for us. We had many meetings on that and——

Mr. DeGarmo: May it please the Court, in order that I won't have to make a continuing objection or a continuous objection, I wish at this time to show

(Testimony of Charles J. Knapp.)

an objection to any conferences held and any statements made at conferences held between the Hanford Contractors Negotiating Committee and any labor organization upon the ground that they are not binding or in any way shown to be binding upon the Morrison-Knudsen Company, inasmuch as we were not a member of the organization or otherwise connected with it.

Mr. Etter: It has already been testified that Mr. Reed of Morrison-Knudsen was at these meetings.

The Court: In cases where a representative of Morrison-Knudsen, the plaintiff here, was present, I think you may, otherwise not.

Mr. Etter: Yes, yes. [680]

Mr. DeGarmo: For the purpose of showing what was said, but not to be binding?

The Court: Oh, well, yes.

Mr. DeGarmo: The testimony is that Mr. Reed was an observer and there is no contrary testimony; that he merely sat in on these meetings as an observer.

The Court: The Court has in mind that that is his testimony and that is a matter that will have to be decided.

Mr. DeGarmo: The thing that bothers me is unless they will indicate which meeting that Mr. Dunn was present, then I don't know how——

The Court: Mr. Reed?

Mr. Etter: Mr. Reed.

Mr. DeGarmo: Or Mr. Reed, rather, was present——

(Testimony of Charles J. Knapp.)

Mr. Etter: We will try and do that, if we can. The one thing is that I have this, so we don't get into any difficulty later. Counsel, I gather, is making some point on the fact that we haven't shown proof that there was any authority in the Hanford Negotiating Committee or no authority from Morrison-Knudsen and, if I understand, he is claiming there must be some showing of their authority.

Mr. DeGarmo: Yes, I am contending that they had no authority as far as Morrison-Knudsen Company. [681]

Mr. Etter: Yes. In view of that, it is going to be necessary to go back into the history of this project. I just want you to know that that is the position, just to prove that point. Well, I notice it is——

The Court: I have a long distance telephone call. We may as well recess now until 2:00 o'clock.

(Whereupon, the trial in the instant cause was recessed until 2:00 o'clock p.m., this date.)

June 13, 1957

(Whereupon, the trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had:)

The Court: I'm sorry to be late, gentlemen. I had a dental appointment that ran over. Fortunately, this is the last one of the series, at least I will not have an excuse for being late next time. [682]

CHARLES J. KNAPP

having previously been duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

The Court: Let's see, this is direct examination?

Mr. Etter: Yes, direct of Mr. Knapp. [683]

Q. To go back a little, Mr. Knapp, I think you told me that you had been connected in some way with the building trades in the Pasco-Kennewick area since about 1943 when the work began on the Hanford Area? A. Yes, sir.

Q. I want to ask you, at that time, did you, besides representing your Local and acting as secretary of the Pasco-Kennewick Council, did you have any other position in '43 or '44 or '45?

A. Not with labor, but I was the labor co-ordinator on the Project in the latter part of 1943, the year of '44 and '45.

Q. And you were appointed as a labor co-ordinator by whom?

A. Under Secretary of War Patterson.

Q. You were labor co-ordinator then for how long?

A. About nearly all of '45, this last half of '43, all of '44, and most of '45.

Q. And all of '45? A. Yes.

Q. Approximately two and one-half years?

A. About that, yes, sir.

(Testimony of Charles J. Knapp.)

Q. And during the time you were labor co-ordinator, what were your duties in that position?

A. Well, to make decisions of disputes, through disputes and decisions over jurisdiction of work between unions, [684] between unions and the contractors, where there is a dispute between a steward or men on the job and supervision, I was called in to make settlement on that. I was also called in to make decisions on jurisdictional disputes and anything that had to do with labor disputes or trouble on the job.

Q. I see. And that work applied, did it, to the entire area? A. Yes.

Q. And to all of the contractors, subcontractors, and employees? A. That's right.

Q. And how many men at times did this cover, at least that work you were doing?

A. I think as many as 75,000 men.

Q. At one time? A. Yes, sir.

Q. And during the time that you acted as a labor co-ordinator for two and a half years, was there any work stoppage at all?

A. There was no strikes. The only work stoppages we had was just as long as it took me to go out to Hanford, inspect the work, and make a decision.

Q. I see.

A. Very short duration, all of them. [685]

Q. And you continued then, not only with that work, with that experience, but you continued then to be associated with that project in one way or an-

(Testimony of Charles J. Knapp.)

other up until the present time? A. Yes.

Q. In the capacity that you have already described?

A. Well, I was not co-ordinator after '45, of course.

Q. No, but in the other capacities?

A. Yes.

Q. Representing your local and the building trades council? A. That's right.

Q. Now, in 1952, was there a meeting, an area meeting, between the A.E.C., the unions, and the contractors, both on the job and prospective contractors? A. Yes.

Q. Where was that meeting?

A. The meeting was held in a building near the administration building in the village of Richland.

Q. Who presided over that meeting?

A. The first meeting was presided over by David Shaw, who was then the manager for the A.E.C.

Q. He was a resident manager of the project?

A. Yes.

Q. And do you remember how many contractors, employers, we'll say, unions, and otherwise, were represented along [686] with representatives of the A.E.C.?

A. I don't know how many there were. However, Mr. Shaw had told me previously that he was inviting more than 200 contractors.

Q. I see. And do you know whether those contractors that were there were all contractors then employed in the Hanford Works Area?

(Testimony of Charles J. Knapp.)

A. Oh, no; there was a very few employed there at that time.

Q. And were there a number of contractors there that were not working there, you might call prospective contractors? A. Yes; that is true.

Q. Was the representative of the plaintiff in this action present that you remember?

A. I remember that Ray Fortune was there. I talked with Ray several times that day.

Q. During that day? A. Yes, sir.

Q. And he was the man who, I think, Mr. Knack said preceded him? A. Yes, sir.

Q. The labor relations man with certain jurisdiction for the plaintiff?

A. Yes, sir. [687]

Q. Is that correct? Was there discussion of the contractual relations between unions and employers, prospective and present, held at that meeting?

A. Yes.

Q. Was that participated in by the contractors, present, prospective, representatives of the union, and Mr. Shaw and his aides and associates?

A. Yes.

Q. I see. Do you recall that any definite agreement as to the contractual relations to exist on that project were stated at that meeting by Mr. Shaw or anybody else, and, if so, will you tell us what was said?

A. Well, the question was put at the time as to whether this agreement would cover all contractors who might come on the job. We had had some discussions on that before, and Mr. Shaw stated at the

(Testimony of Charles J. Knapp.)

meeting that if labor and management, or the committees from those two groups, could write a satisfactory agreement, that the agreement would cover all contractors who come on the Atomic Energy jobs at Hanford.

Q. Do you know whether——

Mr. DeGarmo: Just a minute, pardon me, Mr. Etter.

Mr. Etter: Yes.

Mr. DeGarmo: I am not objecting to this [688] testimony. If I understand the purpose of this, it is being offered in an attempt to show that Morrison-Knudsen Company was a party to the Hanford Works Agreement?

Mr. Etter: That is correct.

Mr. DeGarmo: Well, if that is the purpose of it, just as long as it is limited to that purpose, I am not objecting.

The Court: Yes; all right.

Mr. Etter: No; I will tell you definitely that is the purpose.

Q. Did Mr. Shaw say or suggest or direct any manner in which this was to be accomplished?

A. Later in the meeting, before the meeting adjourned and before Mr. Shaw left the building, I talked with Mr. Shaw about the statement he had made and he reassured me——

Mr. DeGarmo: Just a minute. Was any representative of Morrison-Knudsen Company there at the time? A. With Mr. Shaw and I?

Mr. DeGarmo: Yes.

A. No, sir.

(Testimony of Charles J. Knapp.)

Mr. DeGarmo: Then, I object to that upon the ground it is pure hearsay and not binding on this plaintiff. [689]

The Court: No; I shouldn't think it would be.

Mr. DeGarmo: I want to also first show my further objection to this line of questioning upon the ground that it is contrary to the terms of the written document. We have before the Court the agreement between the Atomic Energy Commission and Morrison-Knudsen Company, Inc., which specifically states the binding effect of the Hanford Works Agreement upon the plaintiff. It says as long as that agreement is in effect, we will abide by the conditions. That was a written agreement which we have with the A.E.C. Therefore, any oral statement that Mr. Shaw or anybody else connected with A.E.C. may have made in 1943 certainly is not binding upon us.

Mr. Etter: Well, I think that——

Mr. DeGarmo: I thought we were trying to show the authority of the Hanford Contractors Negotiating Committee and this testimony is not relevant to that.

Mr. Etter: Well, I think it may be, myself.

The Court: Well, if it is anything——

Mr. Etter: This personal thing, that is correct.

The Court: ——it could be binding upon the plaintiff; of course, it wouldn't be unless some representative of the plaintiff were present. [690]

Mr. Etter: That's right. The reason I bring this up, your Honor, I don't know whether you recollect it, and I might be clumsy the way I am getting

(Testimony of Charles J. Knapp.)

at it, but in the case tried in Yakima, if your Honor will remember, Graham, I think, versus Pasco-Kennewick Building Trades, No. 917, Mr. Knapp testified as to the relationship of the contractor coming on the project and at that time, if you recall, he said as preliminary to the actual carrying out of this agreement over the next five years by the appointment of a committee, which Mr. Knapp testified down there that Mr. Shaw directed be appointed from each side, that he made this statement of this personal statement and then followed it, showing that that had occurred, and the government and the other people there, that is, the attorneys for General Electric and the A.E.C., took a recess and called Mr. Shaw to verify the statement of the testimony that Mr. Knapp had made, if you recall, and, as I understand, we are advised that that was in accord with what he says——

Mr. DeGarmo: I don't understand anything like that has anything to do with this case.

Mr. Etter: I don't say that his statement is binding on plaintiff, Morrison-Knudsen, but I do want to show pursuant to that what the practice was in line with showing that these people were working on the project in [691] December of 1955 and January, February and March under this agreement. That is the only purpose I have; nothing further.

The Court: Well, couldn't you show that without resorting to hearsay statements?

Mr. Etter: I think I can.

(Testimony of Charles J. Knapp.)

The Court: Of persons out of the presence of any representative of the plaintiff?

Mr. Etter: Yes; I believe I can.

Q. Mr. Knapp, in accord with this meeting, was a committee formed by the Hanford Contractors?

A. A committee was appointed as the result of that meeting.

Q. I mean, as the result of that meeting?

A. Yes.

Q. And has such a committee functioned on behalf of the Hanford Contractors since that time?

A. Yes.

Q. Mr. Fortune was present during that part of the discussion relating to the appointment of bargaining committees, was he not?

A. He was at the meeting and I am——

Q. Well, he was at the meeting?

A. I am only guessing he was present when Mr. Shaw made the statement.

Q. I see. Well, in any event, that was done, is that [692] correct? A. Yes.

Q. And was that practice carried out then in 1952 that you know of personally? A. Yes.

Q. And in '53? A. Yes.

Q. And 1954? A. Right.

Q. And in 1955? A. Yes.

Q. And was the committee designated at that time as the Hanford Contractors Negotiating Committee? A. Yes.

Q. I see. How many composed the committee?

A. It was recommended that not more than five

(Testimony of Charles J. Knapp.)

on either side be used, and that was carried out pretty close all the way through.

Q. And can you tell me whether those committees since 1952 have negotiated agreements?

A. They have. There has been different committees because there was different contractors on the job, but there has always been a committee.

Q. I see. In those negotiations, were the union representatives advised of the names of the contractors on [693] the project?

A. The contractors' group and the building trades exchanged letters naming the men on their committee.

Q. No, no; what I am asking you, did the committee advise the labor committee of the contractors that they represented at any time by name?

A. No.

Q. No. In other words, these negotiations were carried on by the committees, is that right——

A. Yes; that is correct.

Q. ——without knowledge of the number or names of the contractors?

A. Well, the numbers didn't mean anything because we never knew who was going to be on the job and when.

Q. I see. Now, when these agreements were consummated, were the agreements, as far as you know, carried out in accord with the agreement made between the Hanford Contractors Negotiating Committee and the unions, were they carried out by all contractors on the project?

(Testimony of Charles J. Knapp.)

Mr. DeGarmo: Now, at what time, Mr. Etter?

Mr. Etter: In 1952.

A. There was only one agreement and that was the Hanford Works Agreement and it affected all people on the project.

Q. That is what I am saying, did all the contractors pay in accord with that agreement? [694]

A. Oh, yes.

Q. They did in '52? A. Yes, sir.

Q. And was that likewise true in '53?

A. Yes, sir.

Q. And in 1954? A. Yes, sir.

Q. And in 1955?

A. That's right. Since '47, in fact.

Q. Since 1947? A. Yes, sir.

Q. This was a formal agreement I am talking about in 1952.

A. '52 was the new agreement, because the old agreement was one that Mr. Shaw objected to and wanted a new agreement written in '52.

Q. I see. But there has been this Hanford Agreement that you are talking about upon which all of the contractors from the project have proceeded since 1947? A. That's right.

Q. And the one you are referring to now is the one that Mr. Shaw proposed? A. '52.

Q. Beg pardon? A. '52 agreement.

Q. '52 agreement? [695] A. Yes, sir.

Q. Were you a member of the negotiating committee for the unions in 1955? A. Yes.

Q. You were? A. Yes, sir.

(Testimony of Charles J. Knapp.)

Q. And in 1955, did you enter into negotiations with other union representatives with the Hanford Contractors Negotiating Committee?

A. Yes, sir.

Mr. DeGarmo: Well, the answer was before I moved, but I move that the answer be stricken upon the ground now that we are getting into prior negotiations again.

Mr. Etter: This is about the work that they were doing and the contract that they say they were working under.

Mr. DeGarmo: We weren't on the job in 1955 until November 28th, according to the testimony.

Mr. Etter: That's right.

Mr. DeGarmo: You have covered the whole year of 1955. I object to the question and the answer and ask that the answer be stricken upon the ground it is getting into negotiations leading up to the contract.

The Court: Let's see, what was the [696] question?

(Question and answer read.)

The Court: I will let the answer stand. You are still talking about the Hanford——

Mr. Etter: Hanford, that is correct.

The Court: ——Negotiating Committee?

Mr. Etter: That is correct, only the Hanford Negotiating Committee.

The Court: All right.

Q. (By Mr. Etter): Who else composed the union representatives other than you, Mr. Knapp?

(Testimony of Charles J. Knapp.)

A. Representatives of the Teamsters and Operating Engineers, at the end of negotiations. At the beginning of the negotiations, I think the Iron Workers and one or two others, but they closed or completed this negotiations and it wound up by having just the three remaining unions.

Q. And you named this morning, I think, the representatives of the employers group. There were Mr. McReynolds of J. A. Jones and Company, Mr. Cochran of L. H. Hoffman, and Mr. McCaffree, who was the executive secretary? A. Yes, sir.

Q. Who represented the Hanford Contractors Negotiating Committee, is that correct?

A. Yes, sir.

Q. And these negotiations, were they carried on in the [697] latter months of December, say, of 1955, that you recall? A. Yes.

Mr. DeGarmo: I wish my objection to go to any negotiations leading up to a contract. This testimony, I can't see how it can have any probative value as to the authority of the Hanford Contractors Negotiating Committee to represent Morrison-Knudsen Company. I can't see what connection there can be between the question and the answer and the fact that he is trying to prove.

Mr. Etter: Well, it is my understanding that the Hanford Contractors Negotiation Committee was the committee that from year to year effected the Hanford Agreement that bound all contractors on the project, including Morrison-Knudsen when they bid this job.

(Testimony of Charles J. Knapp.)

Mr. DeGarmo: Who says it bound all contractors other than yourself?

Mr. Etter: Well, I do say it, that is my contention. Then if you want to make it that way, that is my contention.

Mr. DeGarmo: I thought that is what you were trying to prove.

Mr. Etter: That's right, that is what I am trying to prove. [698]

Mr. DeGarmo: But you can't prove it by the fact that somebody negotiated, that is my point, the contract.

Let me call your Honor's attention to something that is an exhibit here, which is an admitted exhibit, this collective bargaining agreement. I am referring now—I had better refer to the one which is in evidence because then there can't be any question that I am reading the right language.

This is the construction collective bargaining agreement, Hanford Works, State of Washington, plaintiff's Exhibit 6:

“This collective bargaining agreement (hereinafter called the agreement) by and between the signatory construction contractors, representing and acting for contractors who presently or during the life of this agreement become signatory to this agreement * * *”

The Court: That is the area agreement you are reading from?

Mr. DeGarmo: No; I am reading from the Hanford Works Agreement.

The Court: Oh.

(Testimony of Charles J. Knapp.)

Mr. DeGarmo: This is the Hanford Works [699] Agreement. This is the 1952 agreement that he says bound everybody. It says:

“This collective bargaining agreement (hereinafter called the agreement) by and between the signatory construction contractors, representing and acting for contractors who presently or during the life of this agreement become signatory to this agreement * * *”

Now, that, I think, is perfectly plain as to who became bound contractually by this document, and this, I think, is signed by Mr. Knapp, possibly, for one of the unions. I am not sure of that, but let's see. In any event, the agreement speaks for itself as to who is bound by it.

Mr. Etter: I have a further exhibit I want to call attention to.

Mr. DeGarmo: If counsel contends that somebody else is bound by it other than who signed when it didn't purport to bind anybody except those who signed, and he hasn't shown yet that Morrison-Knudsen Company ever signed it. We agreed contractually with the A.E.C. that as long as it was in effect, we would abide by it.

Mr. Etter: Well, my problem arises as long as it was in effect, they would abide by it. Now, let's assume that this negotiating committee reached an agreement [700] with the crafts involved on, say, April of 1956 and signed a Hanford Agreement. Now, it would seem to me that Morrison-Knudsen would be bound by that Hanford Agreement. Counsel, apparently, is of the opinion that they appar-

(Testimony of Charles J. Knapp.)

ently wouldn't be bound by it, as I understand it, and, of course, you can't breach an agreement until you first negotiate for it. Now, the agreement is in the bid specifications that they would be bound by any agreement, and yet——

Mr. DeGarmo: That isn't what it says.

Mr. Etter: What does it say?

Mr. DeGarmo: Read the language of the agreement.

Mr. Etter: Well, rather, I would like to know, I thought that is what you said.

Mr. DeGarmo: It says as long as that agreement is in effect, we will abide by the rates established by the A.E.C.

The Court: How does it refer to the Hanford Works Agreement?

Mr. DeGarmo: I think counsel can call your Honor's attention to the exact language.

Mr. Etter: It is the C something. I made a note of it.

Mr. DeGarmo: It is in the early part. [701]

Mr. Etter: Is it in the early part? I thought it was in the C something.

Mr. DeGarmo: No; it is in the early part up here. There isn't a word in there that we will abide by it.

Mr. Etter: This isn't what I had in mind, counsel. I think I made a note of it. Oh, yes, yes: "During the life of the Hanford Works Agreement, the contractor agrees to pay laborers and mechanics," so and so, "the scale of wages and allowance pre-

(Testimony of Charles J. Knapp.)

vailing at the Hanford Works, including all terms of any modification thereof, as determined by the commission.”

Is that correct?

Mr. DeGarmo: That is what the contract says and that is what we agreed to do. As long as it was in effect, we would abide by the scale established by the commission, not by this agreement.

The Court: It seems to me if you have here the situation of the plaintiff agreeing to abide by the terms of the Hanford Works Agreement so long as it was in existence and we have the written agreement, I don't see where it is any help to the Court to go into the negotiations that preceded the making of that agreement.

Mr. Etter: Except to show, as I thought your Honor recalled, that these crafts and defendants were [702] working under that agreement at the same time they were negotiating with Hanford in 1955.

The Court: Well, you have shown that, that they were working under the agreement, but that is a different thing from going into the negotiations that led up to the making of the Hanford Agreement.

Q. (By Mr. Etter): In other words, as of December, then, of 1955, the employees, or rather the union employees, were working in pursuance of the Hanford Agreement? A. Yes, sir.

Q. I see.

The Court: I understand the testimony of the witness, I don't know, perhaps he didn't testify to

(Testimony of Charles J. Knapp.)

that, but it was my understanding that that was true from '52 to '56, inclusive, that you were always working under that?

A. Yes, sir; that's right.

The Court: The Hanford Agreement?

A. Really, since '47.

The Court: Yes; you did say since '47, although there was a modification of it in '52?

A. Yes, sir.

Q. (By Mr. Etter): And under the modification from '52 to the first of 1956, that is, the first day?

A. Yes. [703]

Q. And did you continue to work until March the 22nd under the terms of that agreement?

A. Yes, sir.

Q. In accord with the terms of it?

A. Yes.

Mr. Etter: I think that is all, Mr. Knapp.

Cross-Examination

By Mr. DeGarmo:

Q. Let's start at the end, Mr. Knapp.

A. All right, sir.

Q. You say that your people worked until March 22nd, 1956, under the terms of Plaintiff's Exhibit 6; is that your testimony?

A. I will make——

Q. No, no; you can answer that either yes or no.

A. I will say yes.

Q. All right; will you tell me what pay that

(Testimony of Charles J. Knapp.)

agreement provided for your cement finishers for 1956?

A. A journeyman's hourly rate?

Q. Yes, sir.

A. Well, I think then we were \$2.90.

Q. Well, are you sure of that?

A. Well, let's see now—\$2.85.

Q. Will you look at the agreement? [704]

A. Wait a minute—\$2.90 is right, sir.

Q. Will you look at the agreement and see if you can find the journeyman hourly rate stated there for the cement finishers?

A. It should be in the index. You asked me on '55?

Q. I am asking you in 1956. You said they worked under that agreement until the 22nd day of March, 1956. I want to know what wage they were receiving, if that agreement was in effect, on March 22nd of 1956?

A. Well, the agreement I have here in my lap was not effective, because it is \$2.68 here. This is a '53 agreement, schedule.

Q. Well, where did you have some other agreement, then? What agreement were you working under?

A. There is a new wage schedule since \$2.68.

Q. Do you have it as a contractual obligation?

A. We most certainly negotiated it.

Q. Well, do you have in your possession a copy of any agreement, Hanford Works Agreement, under which you were to be paid \$2.75 or \$2.90, or whatever it was, in 1956?

(Testimony of Charles J. Knapp.)

A. I don't have one with me. I can borrow one from Mr. Guess or somebody here. I don't have my papers with me at all.

Q. Well, are you positive, Mr. Knapp, what the wage scale [705] was for a cement finisher at Hanford Works in March of 1956?

A. Well, we negotiated 15 cents and we got \$3.00. That would be \$2.85.

Q. What was the approved rate by the Atomic Energy Commission for cement finishers as of January, 1956?

A. Well, Davis-Bacon is the one that approves the rate there and the Atomic Energy Commission is advised of it.

Q. Well, that wasn't the question that I asked you, I asked you what the wage rate was, the approved wage rate, as of January, 1956?

A. It would be \$2.85.

Q. \$2.85? A. I think so. I could be wrong.

Q. You could be wrong? A. Uh-huh.

Q. When you testified on direct examination that it was \$2.90, could you have also been wrong about that?

A. Once I am wrong at \$2.85, I am possibly even wrong at \$2.90, yes, sir.

Q. Well, I am showing you Plaintiff's Exhibit 1 for identification to refresh your memory a bit. Will you look at it and tell me what the approved wage rate was in the contract between the Atomic Energy Commission and [706] the Morrison-Knudsen Company, Inc.?

(Testimony of Charles J. Knapp.)

A. Well, this is \$2.75, but if this is the '56——

Q. Well, was that a '56 rate or was that a '55 rate, or what rate was it?

A. Well, I would say it was a '56, because our next step was \$2.90 and then to \$3.04.

Q. Well, when did you get the \$2.90? When did you get the \$2.90, Mr. Knapp? That is 15 cents; when did you get the \$2.90?

A. Yes, sir. Well, I will have to check back and see when this \$2.75 went in effect.

Q. Well, that contract is dated November 25th, 1955, that you hold in your hand, Plaintiff's Exhibit 1. Would that indicate to you that that was the approved rate in 1955 as of November 25th, 1955?

A. Yes; it would.

Q. Well, was that the wage scale which you continued to receive until March 22nd of 1956, and if you are not sure of your answer, I want you to check?

A. '57, '58. Wait a minute, now, we negotiated a three-year agreement in '56 and didn't take effect until—I believe became effective in April. That was—yes, sir, this was right at that time.

Q. Is it, then, your testimony that \$2.75 was the wage rate of a cement finisher journeyman during all of 1955 and [707] until subsequent to March 22nd, 1956? Is that your testimony?

A. I think it was in April that the rate became effective, the new rate.

Q. Well, I want you to be positive about that so that you are willing to state that as your testi-

(Testimony of Charles J. Knapp.)

mony. Now if you have any doubt about it, I want you to check it.

A. Well, I would like to check it with our agreements rather than this. We have agreements here.

Q. Well, do you have the agreement where you can check it?

A. I don't have one here, unless someone else has some A.G.C. agreements.

Q. Well, now, what has the A.G.C. agreement got to do with it?

A. Well, it would be in the A.G.C. agreement.

Q. Do you mean that the cement finishers had an agreement with the A.G.C.?

A. Builders Chapter, A.G.C., yes, sir.

Q. Negotiated when?

A. We have had agreements with them since about around 1950.

Q. And did you have one in 1956?

A. Yes, sir.

Q. And when did you negotiate the one in 1956?

A. Negotiated in the fall of 1955, but our agreement covered 1956, '57 and '58, so we negotiated in the fall [708] of '55.

Q. Well, are you telling us that the A.G.C. agreement, which was negotiated in the fall of 1955, resulted in a wage increase to journeymen cement finishers on the Hanford Project during the year 1956?

A. When it was approved by the Davis-Bacon, it was effective on all jobs, whether it was Hanford or anywhere else. The A.G.C. sends that wage rate,

(Testimony of Charles J. Knapp.)

approved wage rate, to the Davis-Bacon Division, United States Department of Labor, and then they notify all government and state agencies that that will be the rate on contracts.

Q. Now, perhaps we can get to it another way, Mr. Knapp, was there a Hanford Works agreement after January 1st of 1956?

A. Not a signed agreement, no, sir.

Q. Well, was there any agreement, signed or unsigned?

A. We contend—well, now, wait a minute. We worked under the terms of the Hanford Agreement of '55, yes, sir.

Q. Well, you had been advised by the Hanford Contractors Negotiating Committee that, as far as the contractors were concerned, whatever they represented, which is a little indefinite, I will admit, that the agreement was terminated as of December 31, 1955; isn't that correct?

A. Yes, sir; it said until a new agreement had been reached. [709]

Q. Did it say that it was terminated until a new agreement could be reached?

A. One clause said that it was terminated and another clause that we continue to negotiate until such time as we had reached an agreement, or words to that effect.

Q. Well, were you working under an agreement, then, or under the language which followed the termination?

(Testimony of Charles J. Knapp.)

A. As far as I am concerned, I was working under the Hanford Agreement.

Q. Well, you didn't regard it as having been terminated, then, is that your testimony?

A. For practical purposes, no.

Q. Well, what about impractical purposes, did you regard that the statement that it is hereby terminated as of December 31, 1955, meant something other than what it said?

A. Well, if we hadn't of continued working under the agreement, I would have thought so, yes.

Q. Well, did the contractors negotiating committee in the notice tell you that you were to continue to work under the agreement?

A. We continued working under the terms of the agreement.

Q. Yes, but it didn't say under the agreement, did it?

A. No. No, I don't think it does, just those words, no, but it did say we would continue to meet and negotiate. [710]

Q. Well, let's assume, Mr. Knapp, that you never could reach a meeting of minds, was this to go on forever and ever?

A. I don't think forever, but we have continued on for several months before reaching an agreement.

Q. Well, now, I have here in my hand—I appreciate that you are not a defendant in this case, although we wish you were——

A. Yes, sir.

Q. We didn't happen to have an agreement with

(Testimony of Charles J. Knapp.)

you, but I have a motion here to amend by the unions who are defendants in which they say, and this is their motion:

“Beginning about March 8, 1956, the plaintiff sought to apply to said work the provisions of certain other contracts, namely, Exhibits A and B attached to plaintiff’s original complaint, less favorable to the defendants’ members.”

Do you recognize, Mr. Knapp, that as of March 8, 1956, your union was also told—I am talking about the cement finishers now——

A. Yes, sir.

Q. ——that as of that date, from that date on, at least as far as the members of the A.G.C. were concerned, you were working, the A.G.C. members were working, under the A.G.C. [711] agreements?

A. I wasn’t notified. I knew, however, that others were.

Q. Well, you were present at the meeting when that was stated, were you?

A. Yes; I was at an A.G.C. meeting.

Q. Yes. You were present at a meeting when it was stated by the A.G.C. representatives that as far as they, as far as the members it represented, which they stated were two, from that date on they were working under the A.G.C. agreements, they were willing to consider hardship conditions; isn’t that correct?

A. I heard them say they would consider hardship conditions. We never knew what that meant, really.

(Testimony of Charles J. Knapp.)

Q. Well, you did a lot of talking in those meetings, didn't you?

A. Very little, sir, because I was not a signatory to their agreement. I did under the Builders Chapter meetings, yes, sir.

Q. Well, now, isn't it a fact, Mr. Knapp, that at the meeting of March 10th, at the meeting of March 19th, the meeting of March 21st, that you attended all three meetings?

A. I believe I did.

Q. And isn't it true that at each of those meetings, they were joint meetings of the Building Chapter, as well as [712] the Heavy Highway and Engineering Construction Chapter? Isn't that true?

A. Well, both chapters were represented there, yes, sir.

Q. Yes, Mr. Helvey was there and others on behalf of the Builders Chapter and Mr. Guess and others on behalf of the Heavy Highway and Engineering Chapter?

A. I think so.

Q. And you had considerable to say in those meetings, did you not?

A. I don't think so.

Q. Well, we will come to that in a few minutes.

A. Okay.

Q. At the recess, if we have one, Mr. Knapp, I want you to check the question of when there was a change in pay scale at the Hanford Works for cement finishers in the year 1956 and be able and be prepared to advise me when the court commences.

I want to turn now for a minute to this meeting

(Testimony of Charles J. Knapp.)

that you state took place on January 5th, 1956, at Pasco, is that correct? A. Yes, sir.

Q. And that was a meeting which had been called or had been requested, at least? I won't say called; it had been requested——

A. Uh-huh. [713]

Q. ——by Mr. Shirk, who was the secretary of the Pasco-Kennewick Building Trades Council, is that correct? A. Yes.

Q. And I believe you characterized that meeting as a pre-job conference? A. Yes, sir.

Q. Now, I would like for you, Mr. Knapp, to tell me—this meeting took place from approximately 3:00 o'clock until some time around—or, let's say, 2:30 to somewhere around 5:00 or 5:30?

A. Yes, sir.

Q. Will you tell me what subjects were discussed during the course of that meeting and, if you can, tell me in each instance who brought up the subject and who discussed it?

A. Well, there wasn't—at this particular conference there wasn't many items discussed. Mr. Knack introduced himself, told about the contract that they had. He explained that Mr. Reed would be the project manager, he told about how many carpenters and other crafts that he would use and about when there would be the hiring of those particular crafts. There wasn't much else explained there. There was a few questions asked. I don't remember just what they were. There were the usual questions that was asked at pre-job [714] confer-

(Testimony of Charles J. Knapp.)

ences. There was some story-telling and other things discussed. It was quite a—oh, just a usual get-together of men who are interested in getting a job started. There wasn't any particular business discussed up till the time that I pin-pointed two things that I was particularly interested in.

Q. And all of this that you have mentioned took place in approximately two and a half hours?

A. Yes, sir.

Q. Because, as I understand you, the conversation which you state you had with Mr. Knapp did not take place until the tail end of this meeting?

A. That's right. However, we discussed, oh, many things, where Mr. Knack had been, he told us of some of the experiences at different places. We discussed with Mr. Reed his experiences on the California job. Oh, there was many, many stories told and just an afternoon of getting acquainted, principally.

Q. And that is the extent of your recollection of that meeting except the very specific thing upon which you have testified?

A. Yes; there was only two things I was particularly interested in, because most of the other things were included in both agreements. They are very much alike with the exception of the two or three things in the [715] Hanford Works Agreement that A.G.C. agreement doesn't contain. One of them is isolation pay and, of course, bus transportation wasn't included in, either, but I was particularly interested in that.

(Testimony of Charles J. Knapp.)

Q. Well, now, this morning in answer to the question from your counsel as to what was covered under the Hanford Works Agreement, you stated that bus transportation was one of those items. That was an error, wasn't it?

A. Well, it never has been in the agreement, no, sir. I doubt that I said that, sir, because I knew better. We have never had it in the agreement since 1947. It has never been in any agreement since 1947.

Q. As far as your particular craft or the Operating——

A. Any other craft.

Q. ——Operating Engineers or the Teamsters?

A. That's right; no other craft, with the exception of two or three of the shop crafts. For instance, they have the Plumbers' busses written in, their transportation written in. Ours never did.

Q. Well, do you mean to tell me then that in spite of the fact that there was no contractual obligation on behalf of the employer to furnish bus transportation, that you were laying that down as one of the conditions of continued employment?

A. Yes, sir. [716]

Q. And you had repeatedly negotiated addendums to the Hanford Works Agreement without including that as one of the contractual items?

A. That's right.

Q. And you insisted, even before the Ching Panel, did you not, that that was one of the conditions of continued employment?

A. That's right.

Q. And it never was a contractual provision?

(Testimony of Charles J. Knapp.)

A. Never has been in an agreement, no, sir.

Q. And is not now?

A. No, sir; it isn't. We have never been without busses, sir, regardless of whether it was in the agreement or not.

Q. Well, do I understand, then, as far as you are concerned, that it doesn't make any difference that the written contract is, if you want it, you use that as a condition of continued employment?

A. That each time we have negotiated an agreement, the bus matter has been brought up and we have been assured by the contractors committee that it wasn't necessary to write it in, we had already had busses, and there wasn't any reason for writing it in. We have asked to have it written in at different times and the contractors said it wasn't necessary. [717]

Q. Well, they refused?

A. We took their word for it.

Q. They refused every time, didn't they, instead of just saying it wasn't necessary?

A. No, sir; they didn't refuse.

Q. All right. I want to give you another opportunity, Mr. Knapp, to tell me of any other items of discussion in this January 5th, 1956, meeting that you attended. You were there during the entire meeting, weren't you?

A. Yes, sir.

Q. You didn't leave the room?

A. I don't think I did; I don't remember that I did.

(Testimony of Charles J. Knapp.)

Q. And you can't recall any further items now than you have testified to?

A. I wasn't particularly interested in any items other than those two, because through habit contractors carry out the conditions of their agreements and there is so little difference between the Hanford Agreement and the A.G.C. agreement there wasn't any real point in discussing terms of the agreement.

Q. By the way, you mentioned that at the time of that meeting you knew that the Hanford Works Agreement was out or at least its status was very doubtful?

A. It was indicated by the contractors—we had been advised that it was terminated, yes, that is true, by [718] letter.

Q. Yes. And do you recall whether the subject of subcontractors was discussed that afternoon, Mr. Knapp?

A. That subject is always brought up in any pre-job conference. That is a matter of form. We want to know who their subcontractors are going to be if they know at the time.

Q. Well, was it discussed that afternoon and, if so, what was said about it?

A. I just don't know, sir. I am not concerned with subcontractors and probably didn't pay too much attention to it. I wasn't interested. The plumbers would want to know who the plumbing contractor was, the electricians would want to know who the electrical contractor was, but the union I rep-

(Testimony of Charles J. Knapp.)

resent don't have subcontractors, sir, and I didn't pay any attention.

Q. Yes. Well, now——

A. If I had been secretary, then I would have asked that myself.

Q. There is one thing I want to get fixed for the record, Mr. Knapp, that I am not clear on, and I may not have followed closely enough, but I tried to and missed it.

A. Yes, sir.

Q. I want to refer now to the period from November 1st, 1955—— [719]

A. Yes, sir.

Q. ——until March 22nd of 1956. What office, if any, did you hold in the Pasco-Kennewick Building Trades Council?

A. I was a delegate and a member of the executive board.

Q. Mr. Shirk was the secretary?

A. Yes, sir.

Q. And who was its president?

A. William Dunn.

Q. And he was present and actually presided at this meeting, as I understand it?

A. Yes; that is true.

Q. Well, were you at this meeting then representing the Pasco-Kennewick Trades Council?

A. I was representing at that meeting the cement masons, cement finishers.

Q. Well, were you at that time a business agent of the cement finishers?

A. Yes, sir.

Q. When did you become its business agent?

A. In May of 1943.

(Testimony of Charles J. Knapp.)

The Court: What union was that, did you say?

A. Cement finishers.

Q. (By Mr. DeGarmo): And did that Representation continue through this period that I mentioned from November 1st until March 22nd? [720]

A. Yes, I have been business agent continuously since May of '43 to the present time.

Q. Was there a representative or were there representatives at this meeting of the Operating Engineers? A. Yes, sir.

Q. Who were they?

A. William Dunn was there, because he was chairman, and Art Rossman was there.

Q. Now, I think you stated that Mr. Sewell Davis, who is now dead, and who was a representative at that time, business agent for the Local 839, was not at this meeting?

A. I thought he was, but I have learned since I came here that he wasn't. We read the list of names who were present at the meeting. The list was called in over the telephone from the records that they have in Pasco, and I understand that Davis was not included, but I thought he was there, so I was mistaken.

Q. Was there any representative of the Teamsters at that meeting?

A. I am not certain that there was.

Q. Well, you say you had the list of names read?

A. I don't have the list, the list was called in,

(Testimony of Charles J. Knapp.)

and I have learned that Davis wasn't, but I don't know who else was on the list. I do not have it. [721]

Q. It was not called to you, then?

A. No, sir.

Q. Now, when you originally testified on this matter, Mr. Knapp, did you state that this meeting or the discussion with Mr. Knack was after the general meeting?

A. I did say that and I should have described it in a different way. The general discussion or the pre-job conference, that business was over and then that is when I approached Mr. Knack with the questions in reference to isolation pay and bus transportation.

Q. As a matter of fact, you didn't correct your testimony in that respect until after I had made an objection, isn't that true, pointing out that you had stated that the conversation was after the general meeting?

A. The meaning was the same, but the words that I used were wrong, sir. It doesn't change the fact of when it actually happened.

Q. And then did you state that, "I told Mr. Knack that there were two points that I was particularly interested in and I would have to have the answer for the people that I represented"?

A. Yes, sir.

Q. Was that your testimony?

A. Yes, sir. [722]

Q. Now, you have told us that you at that time

(Testimony of Charles J. Knapp.)

were at the meeting representing the cement finishers as the business agent for the cement finishers?

A. Yes, sir.

Q. Well, was that the people that you represented?

A. I represented others in asking the question, because previous to this meeting the Operating Engineers and the Teamsters and myself had discussed this pre-job conference and we knew that we were going to have to have the answers to those two questions and I said that I would ask the question for myself, as well as the Operators and the Teamsters.

Q. Was it likewise true, Mr. Knapp, that you decided, or at least you testified, that when you said, "I represented," that you were referring to the Operating Engineers, the Teamsters, and the Cement Finishers after I had objected to whatever you agreed to on behalf of the Cement Finishers would not affect the other two crafts? That was when——

A. I qualified my answer in that statement then, saying that I had previously had a conference with these two unions and I would ask the question.

Q. Now I wish to ask you this: Did you tell Mr. Knack who you represented?

A. I don't think so. [723]

Q. You did not tell Mr. Knack that you were speaking for the Operating Engineers, did you?

A. No, sir.

Q. There were—— A. I don't think I did.

Q. There were two representatives in this meeting in the Operating Engineers, were there not?

(Testimony of Charles J. Knapp.)

A. Yes, sir.

Q. Both of them able to speak for themselves, one of them the chairman and Mr. Rossman the business agent, right?

A. Well, everyone there was qualified and capable to ask their own questions, yes, sir.

Q. And you did not tell Mr. Knack that you were asking the question for the Teamsters, either, did you?

A. No, sir; I don't think I did.

Q. Now, in order to make certain that I would not misquote you, Mr. Knack, I had the reporter transcribe what you said——

A. Yes, sir.

Q. ——and I want to read you this and then I want to ask you some further explanation (reading):

“He said that they would pay isolation pay and continue to furnish transportation. He said the Morrison-Knudsen Company had bid the job planning on paying isolation pay and [724] furnishing transportation, that was the way they figured the job.”

A. Yes, sir.

Q. How long did Mr. Knack say they would continue to pay isolation pay and furnish transportation?

A. He didn't say how long. That wasn't the point of the question at all; the question was, “Are you going to furnish free bus transportation and pay isolation pay on your job,” and the answer was, “Yes.”

Q. And he did not state any length of time?

A. No. Had we thought that he meant a month or two months, then we would have—we would have

(Testimony of Charles J. Knapp.)

wanted the answer, but the answer we got we were satisfied that he meant that he was going to continue paying it on the job.

The fact of the matter is Mr. Knack said he was not interested in what the other contractors were going to do.

Q. You didn't tell us about that this morning?

A. No; I didn't.

Q. Now, anything else that he said that you didn't remember this morning that you would like to tell us now?

A. Well, he wasn't interested in job politics.

Q. At the time of this meeting, Mr. Knapp, there was [725] considerable, let's say, disquiet on the Hanford Project about the discontinuance of the Hanford Works Agreement, was there not?

A. Everybody was worried about it, yes, sir, of those three crafts.

Q. Didn't Mr. Knack tell you when you asked him about this bus transportation and the payment of isolation pay that, inasmuch as Morrison-Knudsen Company was the new contractor on the job, that it was not going to be the one to upset the apple cart, so to speak, or to change conditions pending some determination of this dispute that then existed concerning whether it was to continue or be discontinued or whatever was going to happen to it, or words to that effect?

A. I remember distinctly that he said that he was not interested in what the other contractors were going to do. He said that they had bid the job

(Testimony of Charles J. Knapp.)

on isolation pay and free bus transportation and they were going to do it. They were going to do the job. He said they were particularly interested in coming in, getting the job done, and getting out again.

Mr. DeGarmo: Will you read the question that I asked the witness, Mr. Reporter, and let's see if we can have an answer to that either yes or no or perhaps a maybe. [726]

(Question read.)

A. I can't remember that particular conversation, sir.

Q. Would you say that it did not occur?

A. Well, not remembering it, I couldn't say that it didn't or did.

Q. Do you remember, Mr. Knapp, that Mr. Knack called to your attention the proposition that at such time as the unions were ready to start entering into agreements with contractors which would run for the life of the job, that then the contractor, Morrison-Knudsen Company, would be willing to deal on the same basis?

A. No, I don't remember any such conversation as that, no, sir.

Q. Do you recall that Mr.—well, let me ask you directly: Is it a fact that Mr. Knack told you in this same conversation which you have been relating that Morrison-Knudsen Company had an agreement with the Associated General Contractors and, therefore, if they were not required under the agreement and

(Testimony of Charles J. Knapp.)

the furnishing of bus transportation and of isolation pay was discontinued, that the A.G.C. contract would have to abide?

A. No, sir; he didn't say that to me. No, sir.

Q. Well, you didn't tell him that you were representing anybody who had an A.G.C. contract, did you?

A. No, sir. [727]

Q. You didn't have a contract with the A.G.C. Heavy Chapter, did you?

A. I haven't ever had and don't at the present time.

Q. Do you recall, Mr. Knapp, Mr. Knack pointing out to you, when you brought up the subject of isolation pay and bus transportation, that they couldn't guarantee what would be happening as to wages unless you were willing to—that they had an example of Table Rock Dam in which they had estimated a 32 per cent labor cost to a certain date and as of that date it had already gone to 47 per cent?

A. There wasn't any such conversation with me on that, because we didn't discuss wages. I didn't discuss wages with Mr. Knack. Wages are fixed, we were not negotiating with Morrison-Knudsen.

Q. Wages were fixed by whom?

A. Wages are fixed through negotiations with the contractors. In my case, with the Builders Chapter of A.G.C. I wouldn't discuss wages with Mr. Knack.

Q. Well, did you ever negotiate wages with the Hanford Contractors Negotiating Committee?

(Testimony of Charles J. Knapp.)

A. Never negotiated wages with them, wages were always negotiated outside. That is a government regulation, we don't negotiate wages with the Hanford Contractors.

Q. Are there no wages set forth in the Hanford Works [728] Agreement? A. Yes, sir.

Q. Well, how do they come there if they are not negotiated?

A. We negotiate our wages in the Area outside of the government project, and then the contract, when it is once signed, that contract then is sent to the Davis-Bacon Division of the United States Department of Labor. Then all contracting agencies and government agencies are notified that is the rate that will prevail, that is a Davis-Bacon rate, and it is written in the specifications of all government contracts.

Q. It was also included in the Hanford Works Agreement, wasn't it?

A. Oh, yes, and every government contract has the same thing, the same wage, as Hanford was. The Army and the Army Engineers, dam construction, or reclamation, or anything, it has the same wage scale. However, at Hanford, because of the nature of the plant; there are a few fringe items that you wouldn't find off the project. Those are in there because of the nature of the work done at the Hanford Works.

The Court: Take a recess now for ten minutes.

(Short recess.)

(Testimony of Charles J. Knapp.)

Q. (By Mr. DeGarmo): As I understand it, Mr. Knapp, between all of the parties in court we still don't know [729] when the change in the cement finishers' wages took place is that correct, at the present time, or have you been able to dig up the information since you talked to me?

A. Well, I consulted Mr. McCaffree and Mr. Bacon and Mr. Guess, and all of us together have come up with a date I hope you will accept. 1955, our rate was \$2.75; in April of '56, we come up with \$2.90 retroactive to February 1st; and January, '57, it became \$3.00, plus 4 cents cost of living increase.

Does that help you, sir?

Q. Well, I think that is probably satisfactory for our purpose. But, in any event, the increase in 1956 to \$2.90, retroactive to February 1st——

A. Yes, sir.

Q. ——and assuming that that was finally reached some time in April——

A. Yes, sir.

Q. ——it was not pursuant to the Hanford Works Agreement, isn't that correct?

A. I think you are right, sir.

Q. Mr. Knapp, did you have occasion to attend a hearing before the Pasco-Kennewick Trades Council, which Trades Council—I think I properly should call it Building Trades Council—— [730]

A. Yes, sir.

Q. ——at which a charge of some character had been asserted against—I don't know whether it was Morrison-Knudsen Company alone or whether it

(Testimony of Charles J. Knapp.)

was other companies combined with Morrison-Knudsen Company?

Mr. Etter: Could we have the time, counsel?

Mr. DeGarmo: Well, it would be some time, I think, subsequent to March 22nd of 1956. It was during the early portion of the strike after bus transportation had been discontinued and isolation pay.

A. Well, I could best answer that, sir, if I had the minutes of the Building Trades here. I could give you the exact dates, and who attended and what was discussed. I could have them here Monday, if we met, or be here in court again Monday.

Q. Well, that might be advisable for you to do it. Does your present recollection tell you whether you were or were not there?

A. Well, I can't say, sir, whether I was there or not. The minutes, however, gives the names of all persons who attend. We have had so many meetings then, afternoon, evenings, and council meetings, it would be hard for me to say when I was present at any one given meeting.

Q. Well, you didn't have many meetings at which a charge had been heard before the Pasco-Kennewick Trades Council [731] concerning the discontinuance of bus transportation and isolation pay, did you? There was only one that you know of, isn't that true?

A. Well, I think perhaps, sir, we had many meetings. The reason I say that is because there were only three unions out of the entire Building

(Testimony of Charles J. Knapp.)

Trades Council who were at that time at odds with the Hanford Contractors Committee. Many of the other crafts had negotiated their agreements either with the Associated General Contractors or with the Hanford Works Committee. They had completed their agreements. There was only three left and it was—I remember that it was quite difficult to take care of the business of only three unions in a group of 15 or 17 locals. So I would have to have the minutes, sir, to give you a good answer on that.

Q. All right, I wish, even if I complete my examination today—— A. Yes, sir.

Q. ——I want to go into that further on Monday, and I wish you would catch your minutes and see if you can refresh your recollection.

A. I will bring the entire minutes book, providing they can be returned Wednesday, because they have another meeting on Wednesday night. If the Court says leave them here, then, of course, we will leave them. [732]

Q. I just want you to refresh your recollection as to whether you were there at that meeting or not.

The Court: I shouldn't think that it would be necessary to put them into evidence. Use them to refresh your memory or refer to them, and I don't think it would be necessary to put them in.

Mr. DeGarmo: I have no desire to.

The Witness: All right, sir.

The Court: If we do, we will probably arrange for copies to be put in.

The Witness: All right, sir.

(Testimony of Charles J. Knapp.)

Mr. DeGarmo: Oh, yes, I wouldn't want their minutes.

Q. Mr. Knapp, you have testified that you attended certain meetings with the Hanford Contractors Negotiating Committee in the early part of 1956. I wish to ask you if you attended any such a meeting subsequent to the date of March 8, 1956?

A. I can't give you the date, sir. We had several meetings—not many meetings—after January the 1st. We had many informal meetings. I discussed our problem with Mr. McCaffree on several occasions. They were not formal meetings, however.

Q. Well, is your answer that you can't state whether you had any meetings with the Hanford Contractors Negotiating [733] Committee after March 8th, 1956, that you just don't remember? Perhaps I can refresh your recollection.

A. I wish you would.

Q. I will attempt to. A. All right.

Q. Do you recall, Mr. Knapp, that on or about the 8th of March, 1956, you were advised by letter copy from Mr. McCaffree that certain bargaining rights which were referred to as having previously been held by the Hanford Contractors Negotiating Committee had been turned over to the A.G.C. Chapters in Spokane?

A. Yes, I remember that.

Q. And if the date of that letter was March 8, 1956, would that assist you in refreshing your recollection as to whether you had a meeting with the Hanford Contractors Negotiating Committee subse-

(Testimony of Charles J. Knapp.)

quent to that date? A. I think we did.

Q. Will you state when that meeting was?

A. It was either the day before or on the morning of the same day.

Q. Well, as a matter of fact, on the date of March 8th, isn't it a fact that you attended a meeting at which you were told that the rights were being assigned?

A. I think that was a morning meeting and in the afternoon [734] the letter was sent out. I believe that's right, sir.

Q. You did attend a meeting on the 16th of March, 1956, did you not, Mr. Knapp, dealing with the Hanford situation?

A. Was that meeting held here in Spokane that you are referring to?

Q. Yes, sir. A. Yes.

Q. One of the meetings held in Spokane?

A. Yes, I attended a meeting here.

Q. And there were present at that meeting there, were there not, Mr. Peterson and Mr. Zeman on behalf of the Federal Mediation and Conciliation Service? A. Yes, he was here.

Q. And Mr. Guess and Mr. Sather and Mr. Carbon, Mr. Sebeck, Mr. Halverson, and Mr. Helvey were there on behalf of the negotiating committees of the two A.G.C. chapters? A. Yes, sir.

Q. And you were there representing the cement finishers? A. Yes, sir.

Q. At that meeting, did you make any statement to anybody present that Morrison-Knudsen Com-

(Testimony of Charles J. Knapp.)

pany had promised you that they would continue the furnishing of bus transportation and the payment of isolation pay?

A. I don't remember that I did. [735]

Q. As a matter of fact, Mr. Knapp, do you recall any meeting which you attended subsequent to the 5th day of January, 1956, in which the Hanford situation was under discussion at which you made the claim to anybody that Morrison-Knudsen Company, through Mr. Knack, had promised that they would continue bus transportation and isolation pay? A. I don't think I did.

Q. Do you recall, Mr. Knapp, at the meeting in Spokane on March 16, 1956, which I have referred to and I read you the names, at least, of some of the people who were present—— A. Yes, sir.

Q. ——there were others—that Mr. Sather made this statement:

“That the Associated General Contractors is able to negotiate only for A.G.C. members. We have two members at Hanford, so we are able to negotiate for them.”

Do you remember him making that statement?

A. I think he may have made that statement because of the question that I put to him.

Q. Let me read you the further part of what he said. He said:

“As far as getting this settled goes, we [736] made an offer under hardship conditions and, in view of the fact that it was rejected, we withdraw the offer. We believe, to get some place in settle-

(Testimony of Charles J. Knapp.)

ment, we believe this should be taken under Article 9 of the Teamsters agreement and Article 10 of the Operating Engineers agreement,"

which would be the arbitration or the grievance procedure provisions.

A. I heard that discussed. I am not certain, it may have been Mr. Sather who said that. He didn't say it to me, because——

Q. Well, was there any doubt in your mind at that time, at any time after the meeting of March 16th, Mr. Knapp, that as far as the two contractors represented by the Associated General Contractors of America, they were applying the A.G.C. agreement to the Hanford Works?

A. Not in my case, sir, they weren't, because I was not a member, or I mean to say I wasn't under an agreement to the Heavy Highway Chapter of the A.G.C. The fact of the matter is——

Q. Now, this was a joint meeting, Mr. Knapp? Mr. Helvey was there at this meeting, wasn't he?

A. Yes.

Q. And he is the executive secretary of the Builders [737] Chapter, is he not?

A. Yes, that is true. I don't remember that Mr. Helvey made any such statement as that.

Q. You do remember that Mr. Helvey made this statement, do you not? Mr. Hollingsworth, who was a representative of the same organization you represent, is he not——

A. No.

Q. No, I beg your pardon, of the Operating Engineers?

A. Yes, that is true.

(Testimony of Charles J. Knapp.)

Q. Mr. Hollingsworth asked this question:

“Where would that leave the Building Chapter?”

To which Mr. Helvey made this reply:

“Let me answer. We have two members, Jones and Hopkins. We have practically the same grievance procedure in our agreements as the Heavy Chapter. We would be happy to handle this for our members under that procedure.”

Do you remember Mr. Helvey making that statement?

A. I don't remember that he did, no sir. If it is in the minutes of the Chapter, then I am sure he did.

Q. Do you remember that later in the same meeting, Mr. Knapp, Mr. Hollingsworth, on behalf of the Operating Engineers, in response to some question put by Mr. [738] Peterson of the Mediation Service, said:

“I take it the A.G.C. feels we have an agreement. We could take it under that. To be fair, what will we do as of Wednesday morning?”

He was speaking of bus transportation.

A. He may have said it, sir, but I can't recall. There was a great deal of conversation made, and, to pinpoint what anyone said would be difficult without keeping notes, which I didn't do.

Q. Well, now, you were vitally interested in the matter of bus transportation, were you not——

A. Yes, sir.

Q. ——for your members?

A. Yes, sir.

(Testimony of Charles J. Knapp.)

Q. As a matter of fact, you had insisted that your members were more concerned with the matter of bus transportation than either the Operating Engineers or the Teamsters, isn't that true?

A. Oh, I didn't say any such thing as that, sir; I think we were all equally interested in bus transportation.

Q. Well, Mr. Knapp, didn't you bring out at one of these meetings that, because your members were cement finishers and sometimes their work was such that it required them to work after hours, that it was more [739] important that they have transportation than perhaps for some others?

A. I was speaking for the cement finishers and brought up the proposition that most crafts could leave the job at a given time, that is, at quitting time, and in many cases our cement finishers were somewhat scattered on the job and were required to work beyond the quitting time in order to complete their work. Yes, sir, I discussed that at some length with them.

Q. All right. It was a matter of considerable interest to you, then?

A. Yes, certainly.

Q. Do you remember that at the meeting of March 16th, the one to which I have just referred, it was agreed that the bus transportation would be continued one more day? It had originally stated as the 19th and it was to be continued on Wednesday?

A. I think there were two continuations. Just

(Testimony of Charles J. Knapp.)

as to the dates, I can't give you those, sir. I think there were two.

Q. Let me see if I can refresh your recollection.

A. All right.

Q. Wasn't the first one from the 12th to the 19th? A. I think so.

Q. And then there was an addition of Wednesday, which would [740] have been, I think, the 20th, one day more? A. I think that's right.

Q. Now, did you understand at that time that when they were talking about one day extension, that they were still talking about working under the terms of the Hanford Works Agreement?

A. Well, I couldn't—so far as the union I represented, sir, I couldn't work under the terms of the A.G.C. Agreement. So far as I was concerned, we were still working under the terms and conditions of the Hanford Agreement, yes, sir.

Q. But you had no agreement of any kind with Morrison-Knudsen Company?

A. No, sir, other than that they were included with all contractors on the project under the Hanford Works Agreement up to December 31st or January 1st.

Q. You mentioneed in your testimony, Mr. Knapp, that at an early meeting, I think around 1952, a Mr. Ray Fortune was present at the meeting. This was a meeting preliminary to the Hanford Contractors Negotiating Committee?

A. Yes, sir, I'm quite sure I'm right on that.

Q. You are quite sure of that?

(Testimony of Charles J. Knapp.)

A. Quite sure, yes, sir. At least that meeting or the next meeting that was held in the Desert Inn, but I'm [741] quite certain it was at the meeting that was held at the building adjoining the Administration Building at the village of Richland, because I talked several times with Ray Fortune at the time. I'm quite sure it was the first meeting.

Q. It couldn't have been that Mr. Knack and another gentleman by the name of Mr. Thomas of Morrison-Knudsen Company attended that meeting, and not Mr. Fortune at all?

A. I don't remember a Mr. Thomas, sir. I don't remember Mr. Knack. I knew Ray Fortune for several years, I was quite familiar with Ray.

Q. Well, did you talk with him directly at this meeting?

A. Either at the first meeting or the meeting held just a little while after that at the Desert Inn, yes, sir, at one or the other of those. I was quite certain in my thinking that it was the first meeting that was called by the Atomic Energy Commission.

Q. Well, now, I didn't get from your initial testimony that there were two meetings, I only heard of one. Were there two meetings that you talked about?

A. Yes, sir.

Q. As I recall, you mentioned a statement made by Mr. Shaw. At which of these two meetings was that statement made?

A. At the first meeting. [742]

Q. Was it at the first meeting that Mr. Fortune attended?

(Testimony of Charles J. Knapp.)

A. I thought it was, but I could be mistaken, it might have been the second meeting.

Q. Are you sure that Mr. Fortune attended any meeting? A. I'm quite sure of it.

Q. But you don't know whether he was present when Mr. Shaw's statement was made or not?

A. I think all the time that he was at the first meeting. I'm quite sure, I could be wrong. If it wasn't at the first meeting, then I know he was there at the second one.

Q. Mr. Knapp, during the course of years, you have had rather numerous conferences with the Hanford Contractors Negotiating Committee?

A. A great many, yes, sir.

Q. During those conferences, were you led to believe that the individual members of the Hanford Contractors Negotiating Committee were representing specifically their employer? I am speaking now, let's suppose that one was employed by ones and another one by Kaiser Engineers and another one by some other contractor, were they representing, as members of the Hanford Contractors Negotiating Committee, the party that they were employed by only?

A. No, sir, they represented their employer and others who [743] were at the time on the job or those employers who may later come on the job.

Q. Mr. Knapp, isn't it a fact that it was explained to you and isn't it, as a matter of fact, set forth in the agreement that when the Hanford Contractors Negotiating Committee sign, they sign only

(Testimony of Charles J. Knapp.)

as members of the committee and not as representatives of any employer of theirs?

A. That is not true, sir, because there was hundreds of contractors on the Hanford Project and they all worked under the terms and conditions of this agreement and they never signed it.

Q. I asked you if the members of the committee, when they sign or when they negotiated, they negotiated not on behalf of the particular employer that they represented——

A. Yes, sir.

Q. ——but as merely a committee which recommended to employers certain working conditions?

A. When they signed—when they signed the contract as the committee, there was no recommendation, that was it. Not a recommendation, it was a signed contract. They represented the other employers on the project or those who would be employers on the project.

Q. I just want to be sure, perhaps I haven't made myself clear—— [744]

A. Yes, sir.

Q. ——that were you not told on many occasions that if a man happened to be employed by J. A. Jones——

A. Yes, sir.

Q. ——and he was also a member of the Negotiating committee——

A. Yes, sir.

Q. ——that he was not appearing on that committee as a representative of J. A. Jones, but as a member of the Negotiating Committee on behalf of whatever contractors might be represented by that committee?

A. That's right, that is true.

(Testimony of Charles J. Knapp.)

Q. Or might ultimately agree to the contract?

A. I understand you now and that's right.

Q. Yes.

A. I might add, sir, that there were men on the committee, the Contractors Negotiating Committee, who were not even employed on the Hanford Works.

Q. That's right, who didn't even have a contract?

A. That's right.

Q. Yes. So they couldn't have been acting particularly on behalf of their individual employer?

A. That's right.

Q. During the period preceding December 31st of 1955, Mr. Knapp, had there been members of the Pasco-Kennewick [745] Building Trades Council who had refused to continue under the Hanford Works Agreement and who had negotiated separate area agreements?

A. That is true, yes, sir.

Q. Will you tell us who they were?

A. I can tell you one in particular. The Carpenters International Union had formed a District Council and they gave as their reason for separating themselves from the Hanford Agreement that they were members of the Carpenters Conference or Carpenters Council. Therefore, the Conference or Council would negotiate, attempt to negotiate, a uniform agreement within their jurisdiction, and they had withdrawn from the Hanford Works Agreement, believing that their conference could get a better agreement for them than they could get for themselves out of Hanford.

(Testimony of Charles J. Knapp.)

Q. How about the Boilermakers?

A. The Boilermakers set up their seven western states agreement. Therefore, they withdrew from the Hanford Works Agreement.

Q. How about the Sheet Metal Workers?

A. Sheet Metal Workers also set up an association—I mean to say that employers set up an association—and the Sheet Metal Workers negotiated with them, and that agreement, when it was reached, was attached to the Hanford [746] Works Agreement. That's right.

Q. Now, in all of these instances, these separate agreements which were negotiated were applicable to areas greater in geographical character than just the Hanford Works, isn't that true?

A. That's right, yes, sir.

Q. In other words, they were area agreements similar to the A.G.C. agreements here?

A. Yes, sir.

Mr. DeGarmo: I have no further questions of this witness at this time, except to reserve one that I want him to check.

The Court: Yes, all right.

Redirect Examination

By Mr. Etter:

Q. Mr. Knapp, your Local, is it number 478?

A. Yes, sir.

Mr. Etter: Will you mark this?

The Clerk: It will be the Defendants' 10.

Q. (By Mr. Etter): Handing you the Defend-

(Testimony of Charles J. Knapp.)

ants' 10 for identification, this is a copy of a letter. Without answering, would you read that, Mr. Knapp? A. Yes, sir.

Q. Are you familiar with that? [747]

A. Yes.

Q. Is that an exact type of copy received by you to which is appended your local?

A. Yes.

Q. It is.

Mr. Etter: You were inquiring about this.

Mr. DeGarmo: I thought there was already one in evidence.

Mr. Etter: I don't believe there is. I will move that this be admitted in evidence.

Mr. DeGarmo: Well, I will have to state an objection to it, if your Honor please, that I assume that it is offered for some purpose. I don't know what the purpose is at the moment and I am objecting to it upon the grounds that it is incompetent, irrelevant and immaterial. It is not signed by any person representing or shown to have been representing the plaintiff in the case and, therefore, is not in any manner binding upon it. I don't know just what purpose counsel has offered it.

Mr. Etter: Well, Mr. DeGarmo inquired about this very letter when he inquired of Mr. Knapp if he didn't receive a letter from the Hanford Contractors Committee on a particular date, the 9th, saying certain things and he asked certain things of Mr. Knapp. Now I [748] have the letter.

Mr. DeGarmo: I was trying to fix a date, was

(Testimony of Charles J. Knapp.)

all. The witness was indefinite in his mind as to a date and I was trying to refresh his recollection.

Mr. Etter: I think the record will show you mentioned something in connection with the letter.

Mr. DeGarmo: That's right, I did. I was trying to refresh his recollection as to when certain things occurred.

Mr. Etter: I think the whole letter should go in if you refer to it and start inquiring on examination.

Mr. DeGarmo: Well, I have stated my objection.

Mr. Etter: All right.

Mr. DeGarmo: The Court can rule on it.

The Court: Well, I think in view of the cross-examination, it will be admitted. However, the Court is not taking the position that it is binding on the plaintiff unless it is shown to be by the evidence.

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit No. 10.)

Q. (By Mr. Etter): Up until the time of the receipt of this letter, as I understand it, all negotiations were carried on with the Hanford Committee? A. That's right. [749]

Q. And thereafter, as counsel inquired, you met with the A.G.C., that is, both Chapters?

A. Yes, sir.

Q. Is that correct?

A. That's right.

(Testimony of Charles J. Knapp.)

Q. And discussed with them these matters that have been inquired of, is that correct?

A. Yes.

Q. As I understand your testimony, is it the fact that the Hanford Works Agreement from year to year incorporates the area wage scale?

A. Yes, sir.

Q. And that the area wage scale is secured from the wage agreements negotiated by the A.G.C. which are sent to Washington under Davis-Bacon and then that is called the predetermined wage?

A. Yes, sir.

Q. And is placed in effect on government work within the area?

A. That's right, sir.

Q. Including Hanford, the Engineers, dams, and what not?

A. Yes, sir.

Q. So that the increases that you have testified to about here are automatically year from year incorporated in the agreement? [750]

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. And the Hanford Agreement, I think, as you said, has the additional fringe benefits to which you referred, particularly the bus transportation and the isolation pay?

A. Bus transportation is not or never had been.

Q. Oh, pardon me.

A. Uh-huh.

Q. Isolation pay in the contract?

A. Yes, sir.

Q. And the traditional provision, at least for 10 years that you know, of bus transportation?

(Testimony of Charles J. Knapp.)

A. Yes.

Mr. DeGarmo: I don't understand what you mean, counsel, by "traditional provision."

Mr. Etter: Well, you have had it.

Mr. DeGarmo: You mean providing? I just want——

Mr. Etter: You have had it.

The Court: I assume they mean they have had it, although it wasn't in the contract.

Mr. DeGarmo: I assume it means providing by provision. Perhaps I am the one that is wrong.

The Court: Well, that is what I understood it [751] to mean, that they have had it, although it has not been in the contract.

The Witness: That's right, since '43.

Mr. DeGarmo: That's right, kind of a grandfather rights proposition.

Q. (By Mr. Etter): Now, when you were at this meeting on the 16th, you indicated that you in the discussion proposed the question to Mr. Sather that you weren't able to answer or finish telling about it. Do you recall what it was you said to Mr. Sather?

A. Well, Mr. Sather was pretty careful not to discuss too much with me because I was not—I was not under his agreement, I was pretty much ignored by the Heavy Chapter. I had to direct more of my questions to Mr. Helvey. The question I put to them, and Mr. Sather partly answered it and Mr. Helvey completed it, was that under the A.G.C. agreement, what agreement would we have then

(Testimony of Charles J. Knapp.)

with the possible 75 or 80 other contractors who were not members of the A.G.C., and they said that they would only speak for those who were members of the A.G.C., which left us completely without an agreement of all these other contractors who might come on the project, and we were told by both Mr. Helvey and Mr. Sather that it would be our job to deal with those people as they come on the job, which is an impossibility. Because of security [752] regulations, we are not permitted on the project to sign agreements or negotiate or anything else. So we were—the only people that they could or would deal for were at that time two contractors, and they admitted that it was also possible there might be 75 or 80 contractors on the job and no A.G.C. members employed there, which would leave us in a bad way, and we pointed out to them that the Hanford contract covered all contractors. Therefore, the A.G.C. contract wouldn't be a particular benefit to us for that one reason and others. They were very definite in saying they would not have anything to do with a contractor who was not a member of the A.G.C.

Mr. Etter: That is all.

Mr. DeGarmo: I have no further questions.

The Court: That is all, then, Mr. Knapp.

(Witness excused.)

Mr. Etter: Mr. Dunn, please.

WILLIAM H. DUNN

called and sworn as a witness on behalf of the defendants, was examined and testified as follows:

Direct Examination

By Mr. Etter:

Q. Will you state your name, please? [753]

A. William Hubert Dunn.

Q. Where do you live, Mr. Dunn?

A. In Kennewick, Washington.

Q. And how long have you lived at Kennewick?

A. 1947, sir.

Q. You live there with your family?

A. Yes, sir.

Q. And what is your occupation?

A. Field representative at the present time for the Operating Engineers, Local 370.

Q. And by Field Representative, you mean an assistant, in a way, to the business representative, Mr. Rossman?

A. That is true.

Q. That is true. And how long have you been a field representative for the Operating Engineers, Local No. 340?

A. 370.

Q. 370. A. October, 1952.

Q. October, 1952? A. Right.

Q. And prior to that time, did you work at the trade?

A. I worked as heavy duty mechanic.

Q. As heavy duty mechanic? A. Yes, sir.

Q. And now do you recall, do you, a contract that was [754] secured by Morrison-Knudsen for certain work to be performed within the Hanford

(Testimony of William H. Dunn.)

Works Project? A. I do.

Q. And do you recall whether or not any work was performed that affected any of the members of the Operating Engineers, Local 370, in the year 1955, November or December of that year, it being testified that the contract was secured on the 24th?

A. Yes, sir.

Q. Beg your pardon? A. Yes, sir, we did.

Q. You did. Do you remember and can you tell me what work was performed by Morrison-Knudsen on its contract in 1955?

A. I have some notes, may I refer to them?

The Court: Yes, to refresh your memory.

A. On December the 9th, 1955, one operator moved equipment into the 100-F area.

Q. (By Mr. Etter): Into the 100-F area?

A. Yes, sir.

Q. That is within the Hanford Works Project, without going any further?

A. Right, yes, sir.

Q. And was there certain work then carried on in that area?

A. The actual excavation for the building site started [755] December the 12th.

Q. I see. It started December the 12th?

A. Yes, sir.

Q. And do you know when that was completed?

A. Not for sure, the completion of that one job there. On January the 5th, 1956, they started excavation in the 100-H area.

Q. And that is also in the Hanford Project?

(Testimony of William H. Dunn.)

A. That is within the Hanford Project.

Q. All right——

A. And that job was finished on January the 27th, 1956.

Q. I see. Now, on the first job to which you referred in that area, the first work, you said that there were employees, or rather there were union members of Local No. 370 engaged in that work on December the 12th? A. Right.

Q. There was one that moved machinery in or helped move it in on the 9th, is that correct?

A. That is correct.

Q. And do you know how many men you had employed there out of the members of your local union on that job that was started December the 12th?

A. Possibly 6 or 8 people, members of the Operating Engineers.

Q. Members of the Operating Engineers? [756]

A. Yes, sir.

Q. Were you on the Project during the course of the work?

A. I was escorted on the job by Mr. Ray Reed at a later job.

Q. I see. And you saw these men on the job?

A. I did, sir.

Q. They were working on the job?

A. Yes, sir.

Q. What type of work was it?

A. They were running, operating a drag line and cats.

(Testimony of William H. Dunn.)

Q. Drag line with cats? A. Yes, sir.

Q. That is within the jurisdiction of the Engineers? A. That is correct.

Q. All right. Now, do you know whether or not there were any Teamsters working there?

A. Yes, there were.

Q. Beg your pardon? A. They were.

Q. There were. At the same time your men were there?

A. Well, somebody was driving the Euc, so I assume they were Teamsters.

Q. Well, you saw someone driving them, you just assumed that? A. Yes, sir. [757]

Q. From the fact that, I assume, these contracts were made with the unions? A. That's right.

Q. Now, this other job of yours, or the other job upon which your men were employed, was that work commenced—I think it was in January?

A. Yes, sir.

Q. Around the 5th? A. Yes, sir.

Q. And about to the 27th? A. Right.

Q. I see. And did you have men working in there on that?

A. Probably a like number on that project, also.

Q. Probably around a like number?

A. Yes, sir.

Q. At different times? A. Yes.

Q. All right. Now, when your men were working in December of 1955, that was a Morrison-Knudsen contract, was it not?

(Testimony of William H. Dunn.)

A. It was on the Morrison-Knudsen job.

Q. Were your men provided bus transportation and isolation pay in 1955? A. Yes, sir.

Q. And was that bus transportation and isolation pay [758] continued into January of 1956?

A. To the best of my knowledge, it was.

Q. I see. And the wage scale that you were paid, was that in accord with the scales adopted and applied to the Hanford Project each year?

A. It was, sir.

Q. It was? A. Yes, sir.

Q. Now, were you, Mr. Dunn, present at a meeting, a so-called prejob conference meeting, in the Labor Hall at Pasco, Washington, in the afternoon of the 5th day of January, 1956?

A. I was.

Q. And did you occupy some official capacity at that meeting?

A. At that time, I was president of the Pasco-Kennewick Building Trades Council.

Q. You were representing them?

A. Well, I was representing Operating Engineers, but I was there, and I was their president.

Q. You were president of that Council?

A. That's right.

Q. That's right. Had the Operating Engineers, do you know whether they had assigned or authorized certain bargaining by that Council at that time? [759]

A. At that particular time, I could not answer, I do not know.

(Testimony of William H. Dunn.)

Q. I see. Now, did you have some position at the meeting itself?

A. I chairmanned the meeting?

Q. You chairmanned the meeting?

A. Yes, sir.

Q. And it was held in a hall, was it?

A. In the conference room at the new Labor Temple.

Q. In the conference room? A. Yes, sir.

Q. In other words, were you around a big table, is that it? A. That is correct.

Q. That is correct. And who were seated around there? I mean, in number, how many would you say were representing the various unions?

A. Twelve to fifteen fellows, I would say.

Q. Beg pardon?

A. About twelve to fifteen unions.

Q. About twelve to fifteen unions. And were there some gentlemen there who were representing, or least were there, on behalf of Morrison-Knudsen? A. There was.

Q. And tell us the names, if you will?

A. Mr. Lee Knack and Mr. Ray Reed. [760]

Q. And had you known Mr. Knack before that time?

A. That was the first time I ever met him, that day. I met him in Richland at the morning meeting.

Q. You met him at the morning meeting in Richland? A. Yes, sir.

Q. Had you known Mr. Reed before?

(Testimony of William H. Dunn.)

A. I had got acquainted with him before, yes, sir. I went out and visited him at his office.

Q. That was in 1955?

A. Richland, right, yes.

Q. In connection, I assume, with Mr. Reed's job and business and yours? A. Yes, sir.

Q. And you chairmanned the meeting, I understand? A. That's right.

Q. And would you say, to move this along, that it lasted from about 2:30 to 5:30?

A. Approximately, yes.

Q. And particularly will you tell us what you remember, the subjects that you remember that were discussed, and, if you can, by the people who might have been interested and what they might have said or what they said, in substance and effect, as exactly as you can remember it?

A. Well, being chairman of the meeting, I was quite interested in trying to keep the meeting moving, and I [761] know in particular jurisdiction was talked and Mr. Reed—Mr. Knack informed us that any time we had any trouble, any craft, to go to Mr. Reed first before they even bothered him with it, which was a company policy, and he said, "If you haven't went to Mr. Reed, don't come to me with it."

We also talked about various job assignments. He said blue prints would be available, we could go out and study these prints, and we could get together and before this job even came up, we would be able to establish who was going to do the work.

(Testimony of William H. Dunn.)

Also, it was discussed about getting on the job, about the pass situation. It has always been a sore spot on the Hanford to try to get a pass to get on the job, and Mr. Knack informed us that any time we wanted to get on the job, that he would see to it or Mr. Reed would see to it that we got on the job. And usual procedure in prejob conference was discussed by various crafts, particularly the Electricians, and I don't think a Plumber was present, but an Electrician was there and wanted to know who the subcontractor would be for the electrical work, and most problems that would come up in a regular prejob conference was discussed.

Q. Now, do you recall whether there was any discussion with reference to the matter of the contract additions or [762] otherwise that would apply on the work that was being discussed between you men and between Mr. Knack and Mr. Reed?

A. Well, before the meeting even started, the Operating Engineers and the Teamsters and the Finishers had more or less had a kind of a little conference, and it was agreed among the three of us that Mr. Knapp would ask——

Mr. DeGarmo: Just a minute——

The Court: Just a moment. Do you have an objection?

Mr. DeGarmo: Yes, I am objecting to having reached some agreement before the meeting, as not being binding on us, pure hearsay.

The Court: Yes, I assume there were no representatives——

A. No, sir.

The Court: ——of Morrison-Knudsen?

(Testimony of William H. Dunn.)

A. There wasn't.

The Court: Well, I will sustain the objection to that.

Q. (By Mr. Etter): All right, tell us what happened.

A. Mr. Knapp was going to ask Mr. Knack what was going to be the situation pertaining to isolation pay and bus transportation.

Q. Well, all right, will you tell us what occurred, as you [763] recall it, what was said about that?

A. Well, the meeting progressed along, it was just about ready to break up, in fact, some of the fellows had started getting up from the table, and Mr. Knapp said to Mr. Lee Knack, "I got a question I want to ask you," and he asked him what was going to be their position pertaining to isolation pay and free bus transportation, and Mr. Knack's reply to him was, "We bid this under the Hanford Works Agreement and we are going to do the job under that." In those words, that is what the man meant.

Q. And was there any further discussion that you can remember on that score?

A. Well, yes, Mr. Knack said that, "You guys got a problem out there, you settle out there, and we will go along with it."

Q. Anything else that you can remember particularly?

A. Not on that particular subject, no. [764]

(Testimony of William H. Dunn.)

Cross-Examination

By Mr. DeGarmo:

Q. Well, you were here when Mr. Reed testified that he did sit in as an observer at such meetings, were you not?

A. Yes. But when, I don't know.

Q. After the January 5th meeting of 1956 at the Pasco Labor Temple?

A. Yes, I believe that's right.

Q. Yes. Now, these men whom you state were employed members of the Operating Engineers in December of 1956, were they working directly for Morrison-Knudsen Company, or were they working for a subcontractor of [771] Morrison-Knudsen Company?

A. What was the year on that?

Q. In December, 1955, I should say.

A. Yes.

Q. Were they working for Morrison-Knudsen Company or were they working for a subcontractor?

A. For a subcontractor?

Q. Yes. A. Yes, sir.

Q. And was that also true of the Operating Engineers that you mentioned were on the job starting January 5th until January 27th?

A. That is true, yes.

Q. So they were carried on a subcontractor's pay roll and not the Morrison-Knudsen Company's pay roll, as far as you know?

A. That is correct.

(Testimony of William H. Dunn.)

Q. You are also agreeable to the statement, are you not, Mr. Dunn, that the furnishing of bus transportation, as far as the Operating Engineers were concerned, has never been a contractual obligation since 1952? A. It has not.

Q. And, yet, that was one of the provisions that the Operating Engineers were insisting upon being continued even though not contractual? [772]

A. That is true.

Q. And the discontinuance of that was a partial reason for the work stoppage which occurred on March 22nd or 23rd of 1956? A. That is true.

Q. Mr. Dunn, you say you were the chairman of the pre-job conference which was held at the Pasco-Kennewick Building Trades Council building?

A. That is true, that is right.

Q. And was this particular question which Mr. Knapp asked and which you state Mr. Knack answered one which was made in the presence of all of the persons surrounding this round-table conference that you mentioned?

A. I would say they were still all present, yes.

Q. Every one was still there?

A. Well, there might have been one or two left after the meeting started, I don't know that they were all there, but there was quite a number of them still there when the question was asked.

Q. Can you tell us who were there at the time?

A. May I check my notes?

The Court: Yes.

A. At the outset?

(Testimony of William H. Dunn.)

Q. (By Mr. DeGarmo): I mean at the time this statement was supposed to have been [773] made?

A. No, I can't tell you the exact names.

Q. Well, all you can tell me is the people who were there at the meeting showing on your register as having been at the meeting?

A. That is true.

Q. Now, all of the people did not stay through the entire meeting, did they?

A. I don't think so.

Q. And this was, as I think you said, at the tail end or the windup of the meeting that this occurred? A. That is true.

Q. And is it a correct statement that you are unable at this time to tell me who the people would be who were present, still remaining, at the conference when this statement is claimed to have been made?

A. Well, Charlie Knapp was there, myself, Larry King of the Millwrights, Ed Clary of the Painters, Ray Sutherland of the Laborers, Redmond of the Electricians, and I think Mr. Hill was there earlier but he left. Now, I don't think he was there when the statement was made. There was others, but I don't recall who all they were.

Q. Were any crafts interested in the matter of bus transportation and isolation pay other than the Operating Engineers, Teamsters, and Cement Finishers? A. I don't believe so. [774]

Q. Just the three? A. That's right.

(Testimony of William H. Dunn.)

Q. Now I would like for you to repeat again for me, and do it as exactly as you can remember, the words which Mr. Knack used, and I want all that he said in response to Mr. Knapp's statement or question.

A. Well, Mr. Knapp asked, Mr. Charles Knapp asked Mr. Lee Knack, "What would be your position on the isolation pay and free bus transportation?" and I believe his reply to that question was that, "We bid this job under the Hanford Works Agreement and we are going to do the job under those conditions." That is about the substance of what the man said. Might be some other words added, but I don't recall any of them that were added.

Q. Well, do you remember—I am trying to give you an opportunity now to tell us anything that you can recall that Mr. Knack said in addition to the statement that you have mentioned in response to the question which Mr. Knapp asked him.

A. I don't think I can add too much to it.

Q. You don't think you can add anything to that?

A. No.

Q. Do you recall, Mr. Dunn, that Mr. Knack mentioned that they were not willing to enter into any arrangement for the duration of any job unless the unions were willing to [775] do likewise?

A. He could have made that statement, I don't recall it.

Q. Well, now, you know that there was no guarantee of wage rates during the job, do you not,

(Testimony of William H. Dunn.)

even though Morrison-Knudsen made a bid on the basis of wage rates as they existed at the time they placed their bid? A. I don't get the question.

Q. Well, the Hanford Works Agreement had other things in it than isolation pay, did it not?

A. That is true.

Q. It had reference to wages? A. Right.

Q. And it had reference to working conditions?

A. That is true.

Q. And you knew, did you not, that the Hanford Works Agreement was subject to termination?

A. That is true.

Q. And it was subject to modification?

A. That is right.

Q. At the instance of either the contractors or of the unions? A. That is true.

Q. And the only statement that Mr. Knack made was that they bid the job under the Hanford Works Agreement and they were going to do what, finish up under it, or something [776] of that kind?

A. Well, I believe his statement was he was going to do it under it, or something to that effect.

Q. Was going to do it under it?

A. That's right, I don't recall the exact words.

Q. Was there any discussion in that meeting of the fact that the Hanford Works Agreement had already been terminated, Mr. Dunn?

A. I don't recall it.

Q. Well, you had attended a morning meeting at which there had been considerable discussion, had you not? A. That is true.

(Testimony of William H. Dunn.)

Q. And Mr. Knapp was there? A. Yes.

Q. And other of the people who were present at the afternoon meeting?

A. Yes, I believe that is true.

Q. So that it wasn't necessary to state at the afternoon meeting that the Hanford Agreement had been terminated? A. No.

Q. It was known? A. I assume, yes.

Q. Yes, and it had been a subject of considerable discussion at the morning meeting in Richland? A. That is true. [777]

The Court: I assume it will take some little time to finish with this witness so we may as well quit now.

The Court will adjourn until Monday morning at 10 o'clock.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Monday, June 17, 1957.)

Monday, June 17, 1957

(Whereupon, the trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit:)

The Court: All right, proceed.

WILLIAM H. DUNN

having previously been sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. DeGarmo:

Q. Mr. Dunn, I wish for a moment to go back to a matter which was referred to in your testimony on last Thursday and I wish to know if it is now your testimony that Ray Reed was or was not present in a meeting or meetings between the unions and the Hanford Contractors Negotiating Committee in 1955? A. He was not.

Q. All right. Now, in your testimony of last week, Mr. Dunn, reference was made to the matter of predetermined wages. I would like to ask you under what law are predetermined wages fixed, if you know? [780]

A. To my knowledge, Bacon-Davis.

Q. I think—is it not true that it is just the reverse, the Davis-Bacon Act?

A. Oh, yes, Davis-Bacon, yes. Excuse me.

Q. Can you explain for us, Mr. Dunn, just how the wages are predetermined under the Davis-Bacon Act?

A. The wages that are being paid in the surrounding territory.

Q. Well, at what period of time is the determination made as to what are the prevailing wages in the area? A. That I do not know.

Q. Well, is it at the inception of a contract or is

(Testimony of William H. Dunn.)

it midway of a contract or it is from time to time, or do you know? A. I do not know.

Q. Well, now, you testified, Mr. Dunn, that the wages which were being paid in 1956 on the Hanford Project to the members of your union, local 370, were the predetermined wages, did you not?

A. That is true, yes.

Q. Well, now, is that true? A. Yes.

Q. And you are positive of that? A. Yes.

Q. Throughout the entire year of 1956? [781]

A. On the Hanford Project?

Q. Yes, sir.

A. Well, to my knowledge, it is.

Q. I want to call your attention, Mr. Dunn, to Section 20 of the standard form of Government contract 23a which appears as a part of Exhibit 1, and in a portion thereof which is entitled "Davis-Bacon Act, 40 U.S.C., 276-A(7):

"A. All mechanics and laborers employed or working directly upon the site of the work will be paid unconditionally and not less often than once a week and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Act [Anti-Kickback] Regulations [29 CFR, Part 3]) the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and

(Testimony of William H. Dunn.)

such laborers and mechanics; and a copy of the wage determination decision shall be kept posted by the contractor at the [782] site of the work in a prominent place where it can be easily seen by the workers.”

Now, that indicates, does it not, Mr. Dunn, that there was a predetermination of Davis-Bacon rates with respect to this particular contract, that is, the contract between Morrison-Knudsen Company and the Atomic Energy Commission, prior to the entering into of this contract? A. I would say yes.

Q. All right, now, it refers to a part, too. It says that those wages are not less than those contained in the wage determination decision which is attached hereto and made a part hereof.

The Court: That is Plaintiff's contract with the A.E.C., isn't it?

Mr. DeGarmo: Yes, your Honor, Plaintiff's Exhibit 1.

Q. I am calling your attention, Mr. Dunn, to that portion of this agreement which is Part IV, dated September 28, 1955, "Wage Rates and Allowances," and I ask you to refer to that and tell the Court if those are the wages which were paid to your members of your union throughout the year 1956. You will find that portion of it that refers to Operating Engineers.

The Court: This is still Exhibit 1?

Mr. DeGarmo: This is still Exhibit 1, if [783] your Honor please, yes, sir.

A. I think this is still the '55 rate.

(Testimony of William H. Dunn.)

Q. Well, now, those are the predetermined wages, are they not, Mr. Dunn, that are set forth?

A. In this agreement, yes.

Q. And that is the '55 rate, is it not?

A. Right, that is true.

Q. And that is not the rate which was paid to the Operating Engineers in 1956, is it?

A. No.

Q. Then, when you testified that they were paid according to the predetermined wage rate, that was not a fact, was it, in 1956?

A. It was at a later date. The rate was put in at our request through the Davis-Bacon Act and were paid that, our '56 rate, in '56.

Q. Well, now, there is no authority, is there, Mr. Dunn, for more than one predetermination of wages under the Davis-Bacon Act under a single contract?

A. Only one, that is right.

Q. Yes, and that is before the beginning of the job or at the beginning of the job?

A. At the beginning, yes.

Q. And you don't change the predetermined rate from time to time throughout the contract, do [784] you?

A. It is a matter of the contract.

Q. Mr. Dunn, under what contract were the Operating Engineers working at Hanford in 1955?

A. The Hanford Works Agreement.

Q. In 1955? A. Yes, sir.

Q. And that is the agreement which is in evidence here as Plaintiff's Exhibit 6?

A. Yes, that's right.

(Testimony of William H. Dunn.)

Q. Now, I am not stating, Mr. Dunn, to you that all of the addendums to that covering the various crafts were necessarily those which were in effect in 1955.

A. Right.

Q. But it was——

A. Basically.

Q. ——basically under the Hanford Works Agreement?

A. Right.

Q. That you say they were working in 1955?

A. Right.

Q. Under what agreement, Mr. Dunn, were the Operating Engineers working from January 1, 1956 until March 22nd, 1956?

A. What agreement?

Q. Yes, sir.

A. As far as the Operating Engineers, we were with an [785] understanding we were still performing the work under the old Hanford Works Agreement.

Q. Well, now, there was no Hanford Works Agreement after January 1, 1956, was there, Mr. Dunn?

A. Basically, no, but we were still working under the same conditions.

Q. Well, by agreement with whom?

A. Letter from the Hanford Negotiating Committee signed by Mr. McCaffree.

Q. Did you have any agreement with Morrison-Knudsen Company or the Associated General Contractors of America, Spokane Chapter, Heavy Highway and Engineering Branch, that you were working under the Hanford Works Agreement?

(Testimony of William H. Dunn.)

A. No, sir.

Q. Mr. Dunn, what written agreement, if any, was there between Morrison-Knudsen Company, the plaintiff in this action, and the International Union of Operating Engineers, Local 370, providing for the payment of health and welfare benefits and for the terms and provisions of such payments with respect to the members of the union working for Morrison-Knudsen Company on the Hanford Works Project from January 1, 1956 until March 22nd, 1956?

A. You say written agreement?

Q. Yes, sir, a written agreement. [786]

A. To my knowledge, there wasn't one.

Q. Well, do you mean to tell this Court that the Operating Engineers collected health and welfare benefits from Morrison-Knudsen Company on the wages of its employees knowing that there was no such agreement in writing?

A. Well, I don't think the Operating Engineers—maybe the administrator of our health and welfare did, but the Operating Engineers, as such, didn't.

Q. They didn't what?

A. Collect health and welfare.

Q. Well, you know that payments were made to the health and welfare fund for the benefit of the employees working for Morrison-Knudsen Company during that period, don't you?

A. Yes, paid to the administrator, who is hired by the contractors negotiating—contractors' executive members and the unions' representatives.

Q. Your union has representatives on that trust

(Testimony of William H. Dunn.)

into which the funds are paid, does it not, Mr. Dunn?

A. Yes, sir, along with the three contractors.

Q. And it is your testimony that there was no written contract under which those payments were made?

A. To my knowledge, no.

Q. You deny that those payments were made under the A.G.C., [787] Spokane Chapter, agreement, which is in evidence here, between the A.G.C. and the Operating Engineers, as Plaintiff's Exhibit 3?

A. I do not know under what agreement they were paid under.

Q. Well, you say they were not paid under a written agreement; I am asking if you, as one of the business agents for the Operating Engineers, Local No. 370, deny that they were paid under this agreement which I have in front of you as Plaintiff's Exhibit 3?

A. For that particular job?

Q. Yes, sir, for that particular job.

A. I would not know, I don't have the answer.

Q. You just don't know? A. That's right.

Q. Well, you are aware, Mr. Dunn, are you not, that the Operating Engineers, Local No. 370, filed an answer in this case in December of 1956, in which they denied that the agreement which you have in front of you as Plaintiff's Exhibit 3 had any application to Hanford Works or to the work done by Morrison-Knudsen Company there?

A. To my knowledge, when this agreement was negotiated, it wasn't to be applied to Hanford.

(Testimony of William H. Dunn.)

Q. Well, I asked you if you were aware of the fact—— [788]

Mr. Etter: Well, he wouldn't be aware of what I put in my pleading.

Mr. DeGarmo: I don't know whether he would know or not and I want to find out. If he isn't aware of it, he can so answer. A. I don't know.

Q. Have you ever seen the answer of your Union in this case? A. No, sir.

Mr. Etter: I will stipulate with you it is just exactly as you say it is, Mr. DeGarmo, if it is of any value here.

Mr. DeGarmo: I think it will be of considerable value.

Mr. Etter: All right, we will deny it and we denied it for the Engineers, so move along.

Q. (By Mr. DeGarmo): Mr. Dunn, were you present at a hearing here in Spokane before the Ching Panel on June 18, 1956?

A. I was to a hearing of the Ching Panel. I don't remember the date.

Q. Well, it was here in Spokane at the Davenport Hotel, was it not? A. Yes, sir.

Q. And I was in attendance, at least during a portion of [789] the meeting until you insisted I leave, or at least not you but the union members?

A. That is true.

Q. That you wouldn't talk in my presence?

A. I suppose that's right.

Q. Now, is it a fact, Mr. Dunn, that at the hearing either you or Mr. Rossman, in your presence,

(Testimony of William H. Dunn.)

insisted on behalf of the Operating Engineers that the A.G.C. agreement, Exhibit 3, which is before you there, did not cover the work of your members with members of the A.G.C., Spokane Heavy Highway and Engineering Construction Chapter, on the Hanford Project?

A. Yes, we insisted because of the fact when that was negotiated, it was our understanding it was not to apply at Hanford.

Q. Well, you so insisted at that time?

A. Yes.

Q. And is it a fact that you refused, on behalf of the membership of Operating Engineers, Local 370, to return to work under the terms and provisions of the A.G.C. agreement, Exhibit 3?

A. Me, as such, no, sir.

Q. Pardon?

A. As me, as an individual, no, sir.

Q. No, either you or Mr. Rossman, in your presence? [790]

A. Well, Mr. Rossman will have to speak for himself; I did not.

Q. You did not refuse to return to work under the terms of the agreement which is in front of you as Exhibit 3?

A. No, sir.

Q. Well, were you willing at that time to return under the terms of the agreement?

A. If the membership so directed, yes.

Q. Well, did you ever ask the membership to so direct you?

A. There was meetings held, yes, sir.

(Testimony of William H. Dunn.)

Q. And they did not so direct you?

A. That's right.

Q. Did you advise them that you thought that the agreement was effective?

A. Well, sure, we told the people what the agreement was.

Q. Mr. Dunn, did either you or Mr. Rossman, in your presence, at the hearing before the Ching Panel in June of 1956, make any statement to the effect that Morrison-Knudsen Company had made an agreement to continue the furnishing of bus transportation and the payment of isolation pay throughout the life of its contract at Hanford Works?

A. Did we make that statement to the Ching Panel?

Q. Yes, sir. A. I did not. [791]

Q. Well, did Mr. Rossman, in your presence, make such a statement?

A. Not to my knowledge.

Q. Mr. Dunn, under what written agreement with Morrison-Knudsen Company providing for the payment of health and welfare contributions and stating the details as to such payments was work resumed at Hanford Project by the Operating Engineers following the work stoppage of March 22nd, 1956?

A. May I have that question again? It is quite lengthy.

Q. Under what written agreement with Morrison-Knudsen Company, the plaintiff in this action,

(Testimony of William H. Dunn.)

providing for the payment of health and welfare contributions and stating the details as to such payments and how they were to be handled, was work resumed at the Hanford Project for Morrison-Knudsen Company after the work stoppage of March 22nd, 1956?

A. Well, I don't know whether there was an agreement, a written agreement, signed by the Morrison-Knudsen Company and our local or not. I don't know.

Q. You don't know of any written agreement?

A. No, sir.

Q. Well, do you know that health and welfare contributions were paid from that time until the completion of the job by Morrison-Knudsen Company? [792]

A. For the members working for them, yes.

Q. You do know that?

A. Well, the report shows it, that's all I have.

Q. Yes. Is it a fact, Mr. Dunn, that you and Mr. Rossman, on behalf of the Operating Engineers, Local No. 370, refused to resume work at the Hanford Project or to submit the dispute to the Ching Panel prior to an agreement on the part of Morrison-Knudsen Company and the other contractors that bus transportation would continue to be furnished and that isolation pay would continue to be paid pending the hearing before the panel?

Now, if you didn't understand that, I will state it again.

A. I didn't understand, I didn't get it.

(Testimony of William H. Dunn.)

Q. Perhaps it would be better if the court reporter read the question, then we will have the identical question.

(Question read.)

A. I don't know, I don't have the answer for it. It seemed to me that we offered to go back on the conditions we came off pending a hearing.

Q. Well, that included the furnishing of bus transportation and the payment of isolation pay, did it not, which you have contended were the conditions under which you stopped work? [793]

A. I believe that's right.

Q. And that you refused to even appear before the Ching Panel until those conditions were placed into effect again?

A. No, we met before the Ching Panel when our people were still off the job.

Q. Yes, but you refused to even appear before the Panel until there was an agreement that those conditions would again be placed in effect, isn't that true?

A. No, I don't think so.

Q. Well, let me see if I can refresh your recollection. Now, the hearing before the Ching Panel took place sometime subsequent to resumption of work, did it not?

A. That is true.

Q. So that the people were actually back on the job about the 5th of June, isn't that correct, 1956?

A. That's right, yes.

Q. And the hearing before the Ching Panel

(Testimony of William H. Dunn.)

wasn't until about two weeks later, isn't that correct? Maybe a week and a half, around the 18th?

A. Something like that, yes, uh-huh.

Q. And isn't it true, Mr. Dunn, that, on behalf of the Operating Engineers, you and Mr. Rossman refused to even appear before the Ching Panel or to consent that it had anything to do with the dispute until the [794] contractors had first agreed that they would put the conditions which you claimed were existing, the furnishing of bus transportation and the payment of isolation pay, back into effect pending the hearing?

A. That being the case, if they had furnished them all the way through, we never would have had a work stoppage.

Q. Well, granted, but you refused to resume work until that had been done, isn't that correct, or to appear before the Panel?

A. I don't remember what the conditions were.

Q. All right. Now, Mr. Dunn, were there some changes in the wage rates for Operating Engineers contained in Exhibit 3, which is before you, over those which had prevailed under the Hanford Works Agreement?

A. Under the Schedule A, yes, sir.

Q. Yes, sir. And the agreement which you have in front of you as Plaintiff's Exhibit 3 went into effect on January 1, 1956, did it not?

A. Right.

Q. Well, now, isn't it a fact, Mr. Dunn, that the wage rates which are specified in Plaintiff's Exhibit

(Testimony of William H. Dunn.)

3, the A.G.C. area agreement, were placed in effect on the work being performed by Morrison-Knudsen Company at Hanford Project prior to the work stoppage on March [795] 22nd, 1956?

A. To my knowledge, they were, yes.

Q. Well, now, they weren't placed in effect under any Hanford Works Agreement, were they, because there was no such agreement?

A. They were placed in effect the same as the wages were placed in effect in the Hanford Works Agreement, under the same conditions.

Q. Well, just tell me what those conditions were, now. A. Under the Davis-Bacon Act.

Q. Well, now, there was no Davis-Bacon Act that put into effect the wages specified in Plaintiff's Exhibit 3, was there, Mr. Dunn?

A. That is prevailing wages in the surrounding territory.

Q. Well, there was no Davis-Bacon Act which placed into effect the wages in Plaintiff's Exhibit 3, isn't that true?

A. Historically, that is the way it has been on the Hanford Project ever since I have been connected with it.

Q. Can you answer the question that I asked you? Either yes, or no, or "I don't know"?

A. I don't know.

Q. All right. But you do recognize that the wage rates which had been negotiated through the Associated General Contractors, Spokane Chapter, Heavy Highway and [796] Engineering Construc-

(Testimony of William H. Dunn.)

tion Branch, and which were incorporated into Plaintiff's Exhibit 3, were placed in effect by Morrison-Knudsen Company on the Hanford Project prior to March 22nd, 1956?

A. They were placed in effect by all contractors on the Hanford Works prior to March 22nd.

Q. Including Morrison-Knudsen, Inc.?

A. That is true.

Q. Is it your testimony, Mr. Dunn, that those wage rates were not placed in effect under Plaintiff's Exhibit 3?

A. Historically, they haven't been. I don't know in this particular case and I don't know——

Q. Those were increases in wages, were they not, Mr. Dunn, rather than decreases?

A. That is correct.

Q. And they didn't relate to payment of isolation pay or to bus transportation?

A. This agreement?

Q. The increases in wages?

A. No, they did not.

Q. Mr. Dunn, do you, on behalf of the Operating Engineers, recognize or admit that the agreement which you have in front of you as Plaintiff's Exhibit 3 was applicable to the Hanford Works after June 5th of 1956?

A. No, we are still not working under those conditions [797] contained in that agreement at the present time on the Hanford Works.

Q. All right, it is your position that the agree-

(Testimony of William H. Dunn.)

ment, Plaintiff's Exhibit 3, has never up to this time become applicable to Hanford Works?

A. No, sir.

Q. And throughout all of that time, your organization has continued to collect health and welfare benefits from the members of the Associated General Contractors having contracts with the Atomic Energy Commission on that job? A. Yes.

Q. Is there any other written agreement that you know of, Mr. Dunn, under which health and welfare benefits could have been paid other than under the agreement which is Plaintiff's Exhibit 3?

A. Yes, we have a short form agreement.

Q. With whom?

A. With the various contractors, our members, that are not members of the A.G.C.

Q. Did you ever have a short form of contract with Morrison-Knudsen Company?

A. That is possible, I don't know.

Q. You don't know? A. No, sir.

Q. Well, do you think as an assistant business agent that [798] you would know if such a contract existed?

A. Well, they could have several agreements with the contractors and I would never know it. I am not in the main office.

Q. Who would be the man to know?

A. Mr. Rossman: He is the business manager.

Q. All right. Mr. Dunn, do you know that in this same identical area of Hanford Works and throughout the years of 1955 and 1956 that members of the

(Testimony of William H. Dunn.)

Operating Engineers, Local No. 370, were working under Plaintiff's Exhibit 3?

A. Can you let me have that question again?

Q. Do you know that throughout the years 1955 and 1956, there were members of Operating Engineers, Local No. 370, working in the Hanford Works Area under Plaintiff's Exhibit 3?

A. They might have been working for the Army Engineers, but not on A.E.C. work.

Q. Well, they were working for the Army Engineers in that same identical area under Plaintiff's Exhibit 3, were they not?

A. Within the confines of the Hanford Area, yes.

Q. Yes, within the same geographical area as the contractors who were working for the Atomic Energy Commission? [799]

A. Well, it was probably 50 or 60 miles difference in the locations of the jobs.

Q. Well, now, I will ask you, Mr. Dunn, are you familiar with the area known as the Ferry Access road? A. I am.

Q. Isn't it a fact that that particular area was about midway between the two jobs that Morrison-Knudsen had there in the F and H area?

A. A portion of that job was across the river, which is north of the river.

Q. Well, isn't it a fact that the Ferry Access road, which was work being performed under contract with the Army, was about midway between and within the Hanford Works Area the two contracts which Morrison-Knudsen Company—or the two

(Testimony of William H. Dunn.)

works which Morrison-Knudsen Company were performing in, I think, the 100-F and the 100-H areas?

A. No, they are not between them. Your Hanford Ferry is 'way down the river from 100-H and F and 100-H is 'way up the river from them.

Q. Well, it is in between them? A. No.

Q. It was within the Hanford Works Area, you will admit that? A. A portion of it, yes.

Q. And there have been contracts performed within the [800] Hanford Works Area for the United States Bureau of Reclamation under the A.G.C. agreements, have there not?

A. Not to my knowledge.

Q. Not to your knowledge? A. No, sir.

Q. Well, when we talk about the works for the Army Engineers or the U. S. Army, we are not talking about a single contract, are we, in the years '55 and '56?

A. I wouldn't have any idea, I don't know what you are driving at.

Q. Well, there was more than one contractor doing work for the U. S. Army Engineers in the Hanford Works Area in 1955 and 1956; you do know that, don't you?

A. If you want to call the Wahluke Slope Area the Hanford Works, it is.

Q. Well, isn't it a part of the Hanford Area?

A. No, it isn't.

Q. It is not within what is known as Hanford Works?

(Testimony of William H. Dunn.)

A. No, that is in part of the controlled area but not the Hanford Works.

Q. Well, let's restrict ourselves to the Hanford—what you call the Hanford Works Area. Was there just one contractor performing work for the U. S. Army or Engineers in that area in 1955 or [801] 1956? A. I don't have any idea.

Q. Did you have any supervision over the work of the Operating Engineers for contractors performing work with the U. S. Army?

A. If there were Engineers out there, they were, yes.

Q. And you are testifying here that you don't know how many contractors there were working for the U. S. Army in the Hanford Works Area in 1955 and 1956?

A. In the Hanford Works Area, I wouldn't have any idea.

Q. And, yet, that was under your supervision?

A. We got fellows that we send out on jobs we don't see them for maybe six months. We don't dog them every day to find out where they are, on what jobs.

Q. And you don't keep track of where your men are working? A. No.

Q. For what contractors?

A. When they get out of work, they come back into the office and we send them on other jobs.

Q. Mr. Dunn, were you present at a meeting held on March 10, 1956, at the office of the Associated

(Testimony of William H. Dunn.)

General Contractors, Spokane Chapter, Heavy Highway and Engineering, in Spokane, Washington?

A. March the 10th?

Q. Yes, sir.

A. I attended meetings in March, but I don't remember the [802] date, don't know. I could have been there.

Q. Well, do you recall—see if I can refresh your recollection about it—that on March 8th a meeting had been held with the Pasco-Kennewick Building Trades Council at which the representatives of the unions were advised that there had been some, at least, attempt to assign bargaining rights to the Spokane chapters of the A.G.C.? Do you recall that instance? A. Yes.

Q. And that the A.G.C. agreements, including travel pay, were to be considered as effective March 12th?

A. I believe we had a proposal like that, I believe that's right.

Q. Yes. That was at the Pasco-Kennewick Building Trades Council meeting, now, that that statement was made, and that meeting of March 10th was had because of that statement?

A. Yes, I believe that's right.

Q. And there were present at that meeting, were there not, Mr. Mack Sather, who is chairman of the Labor Committee for the A.G.C. Heavy Chapter—

A. That's right.

Q. —and Mr. Dewey Murrow?

A. I believe he was there, yes.

(Testimony of William H. Dunn.)

Q. Who was also a member; Mr. Carl [803] Carbon?
A. Yes.

Q. And Mr. Guess was there? A. Yes.

Q. And Mr. Charles Helvey, who was the head of the Building Chapter of A.G.C.?

A. Well, I am not positive, but I believe he was there.

Q. Do you remember whether any other representative of your organization was present?

A. I am sure if I was there, Mr. Rossman was there.

Q. And Mr. Davis and Mr. Robert Lewis were there on behalf of the Teamsters; do you recall that?

A. I believe they were there, yes.

Q. Now, was it made plain to you at that meeting, Mr. Dunn, by Mr. Sather that the Associated General Contractors, and I am talking about the Heavy Highway and Engineering Construction Chapter now, considered that the agreement which you have in front of you as Plaintiff's Exhibit 3, and the Teamsters' agreement which is here as Plaintiff's Exhibit 2, were considered as then being in effect on the Hanford Works Project?

A. There might have been talk along that line, yes.

Q. Was there a proposal made to the representatives of the Operating Engineers, the Teamsters, and the Cement Finishers on that day with regard to the effectiveness of the two agreements that I have mentioned, the Exhibit [804] 2 and Exhibit 3, and the willingness of the A.G.C. Chapters to consider

(Testimony of William H. Dunn.)

and amend the agreement on account of the hardship features of the application of the agreements to Hanford Works?

A. Well, I believe there was talk along that line.

Q. I am handing you Defendants' Exhibit 7, Mr. Dunn, and ask you if that is the written statement of the proposal which was made by the A.G.C. on behalf of its members, and I am talking of the Spokane Chapter, Heavy Highway and Engineering, at the March 10th meeting?

A. There is no date on it, except pencilled in. I would have to assume this is it. As best I recall, this is the substance of what was proposed.

The Court: May I see that, please?

(Document handed to the Court.)

Q. (By Mr. DeGarmo): In the proposal which you had before you as—I think Defendants' Exhibit 7—was any mention made or consideration given to the furnishing, continued furnishing, of bus transportation?

A. I don't believe it is, I don't recall.

Q. Well, perhaps the agreement speaks for itself.

A. It speaks for itself.

Q. I just wanted to test your memory as to whether you remembered that there was any proposal on behalf of the A.G.C. that bus transportation be continued? [805] A. No.

Q. Do you remember whether there was any discussion that day as to whether it was to be continued?

(Testimony of William H. Dunn.)

A. To my knowledge, it would be discontinued.

Q. Yes, as a matter of fact, you were told at that meeting, were you not, that bus transportation would be discontinued; it would be continued after this meeting until the 19th, which was one week from the date of the meeting?

A. I don't recall.

Mr. Etter: That is on the 10th, I think, Mr. DeGarmo.

Mr. DeGarmo: I beg your pardon, it is 12 days, it is until the 19th. You had originally been told it would be discontinued on the 12th, had you not, that the A.G.C. agreement would be placed in effect on the 12th?

A. I don't recall the dates, but I believe that is correct.

Q. And then they agreed that they would continue bus transportation until the 19th, giving you an opportunity to consider the proposal which was made and which you have in front of you as Defendants' Exhibit 7; isn't that correct?

A. I don't recall.

Q. You don't recall. Now, you were also present, were you not, at a meeting held in Spokane in this building on [806] the 16th of March, 1956?

A. I believe so, yes.

Q. Was that a meeting which had been requested by the Federal Mediation and Conciliation Service and which was held in the Federal Building for that reason?

A. That is correct.

Q. And is it correct, Mr. Dunn, that there were present at that meeting on behalf of the Operating

(Testimony of William H. Dunn.)

Engineers, Mr. Rossman, Mr. Hollingsworth, Mr. Fulton, Mr. Davis, and yourself?

A. That is correct.

Q. And were there present at that meeting representatives of both of the A.G.C. Chapters?

A. I could not answer, I do not know.

Q. Well, if I suggested to you, Mr. Dunn, that there were present Mr. Guess, Mr. Sather, Mr. Carbon, Mr. Sebeck, Mr. Halverson, and Mr. Helvey, would that assist your memory on that subject?

A. I believe those gentlemen were there, yes.

Q. And Mr. Knapp was there on behalf of the Cement Finishers?

A. I believe he was there, yes.

Q. And Mr. Peterson and Mr. Zeman were there on behalf of the Federal Mediation and Conciliation Service?

A. That is correct. [807]

Q. And Mr. Crowder and Mr. Davis were there on behalf of the Teamsters?

A. I suppose. The minutes speak for themselves, but I think they were there.

Q. Well, perhaps this would refresh your recollection: Do you remember that that was the meeting where Mr. Crowder stated that he had been told by the Western Conference by Mr. Brewster to come there and stay until the matter was resolved?

A. He could have made that statement.

Q. Well, do you remember him making such a statement?

A. I do not, no, sir.

Q. That doesn't help you. All right. You do recall now that you were at that meeting?

(Testimony of William H. Dunn.)

A. I would say yes.

Q. Well, do you recall that at this meeting Mr. Rossman, on behalf of the Operating Engineers, made a statement that the membership of the Operating Engineers had turned down the proposal which was stated in Defendants' Exhibit 7 and which had been made by the A.G.C. Chapter, Heavy Highway and Engineering, at the March 10th meeting?

A. Yes, they turned it down at a special called meeting.

The Court: Endorsed on the exhibit, I believe, is that it was turned down by both unions. There isn't any question about that, is there? [808]

Mr. DeGarmo: I don't believe there is any question that it was turned down by both unions.

The Court: I don't think we should spend time on cross-examination on something that isn't an issue.

Q. (By Mr. DeGarmo): Do you recall, Mr. Dunn, that at this meeting on the 16th of March, Mr. Sather stated to the members present that the A.G.C., Spokane Chapter, Heavy Highway and Engineering, was only able to negotiate on behalf of its two members at the Hanford Works Project?

A. I believe that is correct.

Q. Now, was an offer made at that meeting. Mr. Dunn, on the 16th of March, on behalf of the A.G.C. Chapters, both the Heavy Highway and Engineering and the Building Chapters, to submit the question

(Testimony of William H. Dunn.)

of the Hanford Works to the disputes procedure under the two contracts, Plaintiff's Exhibits 2 and 3?

A. I don't recall what—it was talked, but I don't remember what the substance of the conversation was.

Q. Well, do you recall, Mr. Dunn, that when the question was raised, that Mr. Rossman stated that he would first like to secure a legal opinion as to whether the Exhibit 3 was in effect at the Hanford Works?

A. He could have made that statement.

Q. Well, do you recall him making such a statement, that [809] that was the reason that he had given why he wanted to get that opinion, was because the request was made that they arbitrate or submit this to the disputes procedure under the two contracts?

A. I believe that is right.

Q. At that meeting, Mr. Dunn, is it a fact that Mr. Guess made the statement, directing it to Mr. Rossman and Mr. Davis, "Doesn't the no-strike, no-lockout clause in the agreement mean anything to you?"

A. I don't recall him making that statement.

The Court: The Court will recess for ten minutes.

(Short recess.)

Q. (By Mr. DeGarmo): Mr. Dunn, at the conclusion of the meeting on the 16th of March, 1956, did the union representatives request that the bus transportation and the payment of isolation pay be

(Testimony of William H. Dunn.)

continued for a short period of time to give them an opportunity to consult legal counsel?

A. I believe that is true.

Q. And isn't it a fact that another meeting was held on the 21st of March, 1956, at which you were also in attendance?

A. I don't have the date, but I did attend a meeting right away after the first one. I believe that's right, [810] approximately the 21st.

Mr. DeGarmo: I tried to find a better calendar than this, but I wasn't very successful. Perhaps we can use a microscope and read this one.

The Clerk: Marking the Plaintiff's 11.

Mr. DeGarmo: I want to fix some dates. I merely want to fix some dates, and this is the calendar showing the years '55, '56, and '57.

Mr. Carey: I don't think we are in a position to dispute the calendar, your Honor.

The Court: Well, if it is authentic.

Mr. Carey: I am not an astronomer.

The Court: I think it is more a matter of convenience for the Court. The Court will take judicial notice that certain days fall on certain days of the month—the days of the week fall on certain days of the month.

Mr. DeGarmo: I thought perhaps there would be less room for argument between the witness and myself if we had a calendar.

The Court: I see, all right. Are you offering that?

(Testimony of William H. Dunn.)

Mr. DeGarmo: Yes, I would like to offer Plaintiff's Exhibit 11.

Mr. Etter: No objection. [811]

The Court: It will be admitted, then, Plaintiff's Exhibit 11.

(Whereupon, the said calendar was admitted in evidence as Plaintiff's Exhibit No. 11.)

Q. (By Mr. DeGarmo): Mr. Dunn, I am showing you this calendar which contains the three years of '55, '56 and '57, Plaintiff's Exhibit 11, and I am calling your particular attention to the month of March, 1956, and will you tell us from the calendar on what day of the week fell the 19th of March?

A. Monday.

Q. And you have testified that a meeting was held on the 16th. Will you state on what day of the week that day fell? A. Friday.

Q. All right. Then you have also testified, have you not, that there was at the meeting on the 10th an agreement to continue bus transportation and isolation pay until the 19th; they extended it from the 12th to the 19th. That would be until the Monday? A. A week, yes.

Q. Yes. Then, is it a fact that on this meeting of the 16th, the agreement was to continue the bus transportation and isolation pay until the following Wednesday? [812]

A. I don't recall, but I believe that is correct, I am not positive.

Q. And on what day would the following Wednes-

(Testimony of William H. Dunn.)

day be? A. The 21st.

Q. On the 21st. And was it not stated at that meeting that the busses would run on Wednesday, since a meeting was fixed for 9:30 in the morning on that date, to make certain that there were busses actually running on the day that the meeting was to be held, the postponed meeting of the 21st?

A. I believe that is correct.

Q. Now, at this meeting, the meeting on the 21st of March, which was on a Wednesday, was there some report given by members of the Teamsters and Operating Engineers as to the legal counsel that they had obtained in the interim between the 16th and the 21st?

A. Well, I assume there was, and I was there but I don't recall what the report was.

Q. I see. Do you recall that at the conclusion of that meeting on the 21st, the statement was made that as of the following morning, the A.G.C. agreements would be in full effect, the bus transportation would be discontinued, and isolation pay would be discontinued on the following morning of the 22nd?

A. That statement could have been made, but I don't recall [813] who made it.

Mr. DeGarmo: All right, I have no further questions.

Mr. Etter: No questions.

The Court: That will be all, Mr. Dunn.

(Witness excused.)

Mr. Etter: Mr. Rossman.

The Clerk: Mr. Rossman, you have already been sworn.

The Court: Yes, he has already been sworn.

ARTHUR A. ROSSMAN

having previously been sworn, resumed the stand on behalf of the defendants, and testified further as follows:

Direct Examination

By Mr. Etter:

Q. You are Arthur Rossman, you testified here before, and you are the business representative of the International Union of Operating Engineers, Local 370, and have been such for approximately, I think you stated, 17 years? A. That is correct.

Q. You, then, Mr. Rossman, were the business representative of the Operating Engineers at the time the first work started on Hanford in about 1943? [814] A. Yes, sir.

Q. And have continued to be such business representative from that time until the present time?

A. Yes, sir.

Q. And you were aware, were you not, Mr. Rossman, in 1955 that Morrison-Knudsen was to perform work on what is known as the Hanford Works Project? A. Yes, sir.

Q. And at that time, it is true, likewise, that your representative or one of your employees in that area was Mr. Dunn, who has just testified?

A. Yes, sir.

Q. Now, in accord with the exhibit and contract, it appears work commenced, at least by Morrison-

(Testimony of Arthur A. Rossman.)

Knudsen, on the Hanford Works Project on about November the 28th. Were you aware of the fact that certain of your members were employed on that project in December of that year?

A. Yes, sir.

Q. And did that information come from your personal observation or some other source?

A. It comes from the records we keep in our office. Men are dispatched to these jobs on the dispatch slip or the referral slip, which is made out in duplicate or in triplicate. The original goes to the employer, the second copy stays in the branch office, and the third [815] copy comes to the main office for filing.

Q. And the main office of Local 370 is here in Spokane, Washington? A. Yes.

Q. So that on dispatch slips being made from a sub-local, let's put it that way, or a sub-office of the local in Pasco, in accord with your explanation of making it out in triplicate, one copy of that dispatch slip is kept as a record here?

A. Yes, sir.

Q. And it is kept as a part of the union's business and in the course of the union's business, is it?

A. Yes, sir.

Q. And that is the way in which you know that there were some men, at least, that were dispatched on to that job, is that correct?

A. That is correct.

Q. Now, as I understand it from Mr. Dunn's testimony, there was work performed on the project

(Testimony of Arthur A. Rossman.)

and on the Morrison-Knudsen contract held with the A.E.C., not only in December of 1955, but in January of 1956, is that correct?

A. That is correct.

Q. And you are aware, are you not, of the fact that there were men on the job, at least through your receipt of [816] duplicate or triplicate copies of the dispatch slips?

A. Yes, both months.

Q. Yes, and did you at either of these times, that is, in December of 1955 or in January or thereafter of 1956, have occasion to know of men from your union on the job by personal inspection or visit to the property, that is, the Hanford Works Project?

A. No, I never visited the project.

Q. So that information is based upon these reports, work slips that you have described, and the manner in which they are handled?

A. That's right. I will qualify that. I visited the project a number of times, but never the Morrison-Knudsen projects.

Q. Never the Morrison-Knudsen projects?

A. No.

Q. Had you been acquainted or were you acquainted, or had you engaged, rather, let's put it this way, in bargaining prior to 1955 with a committee known as the Hanford Contractors Negotiating Committee?

A. Yes, sir.

Q. Beg your pardon?

A. Yes.

Q. And for how many years had you dealt with them, Mr. Rossman? [817]

A. The entire period of their existence. I believe

(Testimony of Arthur A. Rossman.)

the committee, as it was last composed, was set up in 1952 or '3. '52 or '3.

Q. 1952. Would this refresh your recollection, was it some short time after the meeting on the project that has been testified to by Mr. Knapp?

A. Yes, sir.

Q. And at which were present various contractors' representatives and, likewise, Mr. Shaw, in charge of A.E.C. operations, and other aides; is that correct? A. That is correct.

Q. And prior to that time, had you been on the labor committee as a representative in negotiation of agreements on the Hanford Project?

A. My local was represented on the committee. I personally wasn't on the committee at all times. I had an assistant there, at that time Mr. Ray Clark, who acted for me.

Q. You knew through Mr. Clark's representation and consultation, did you, of the manner of bargaining that was carried on?

A. That is right, he reported to me weekly.

Q. And at times, I assume, during that period from 1943 to 1952, you, yourself, acted in the capacity, did you not, as representative of the union in bargaining [818] negotiations, if you recall?

A. Yes, at least as an alternate.

Q. I see. Now, from 1952 on until 1955, did you at any time comprise one of the five appointees to the committee representing the various unions engaged in work on contracts with the A.E.C. on the Hanford Works Project?

(Testimony of Arthur A. Rossman.)

A. I don't believe so. I believe I was appointed at one time and requested that Ray Clark represent Local 370 rather than me due to other work.

Q. I see. You were acquainted with the fact that that committee ordinarily went into negotiations comprised generally of five representatives of each side, and by each side I refer to contractors on the Hanford Project who held contracts with the A.E.C. and five representatives of the unions whose men were employed upon the project by those contractors?

Mr. DeGarmo: Just a minute, if your Honor please. I object to that question upon the ground that it assumes a fact not proven and, therefore, is a leading question in that it assumes that the five persons forming the Hanford Contractors Negotiation Committee were the representatives of all the contractors.

The Court: Well, would you accept an amendment that it purported to represent the employers or the [819] contractors?

Mr. Etter: Purporting, yes, I will accept that.

The Court: If you will accept the amendment to the question, I will let it stand.

Mr. Etter: Yes, purporting to represent all the contractors.

A. Yes, I believe the composition of the committee was five from each side. However, at certain meetings they weren't all there; at other meetings, there were additional people there.

Q. I see. But, generally speaking?

(Testimony of Arthur A. Rossman.)

A. That's right, acting on the committee, there were five.

Q. That was the practice, at least, from '52 until '55, is that right?

A. To the best of my knowledge, that is correct.

Q. During that time from 1952 to 1955, do you know of any contractor who worked on the Hanford Project under an A.E.C. contract who did not conform with the agreements reached between those committees?

A. Yes, one.

Q. One. Which one is that?

A. Cisco.

Q. Cisco. Other than Cisco, do you know of any others?

A. I know of no others. [820]

Q. You know of no others?

A. No.

Q. And that is with respect to work that you are acquainted with that had to do with your union members, that is, Operating Engineers?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. All right. Now, did you carry on, or were there negotiations that you know of in 1955 on behalf of the unions and the Hanford Contractors Negotiating Committee which purported to represent all the employers on the Hanford Works having contracts with A.E.C.?

Mr. DeGarmo: Just a minute, now, Mr. Rossman. In order that the record may be kept clear, if your Honor please, I object to this question upon the grounds that it is again an attempt by the defendants in this action to show prior negotiations

(Testimony of Arthur A. Rossman.)

leading up to the consummation of the contracts in question, Exhibits 2 and 3.

Mr. Etter: I don't know that it is. I am trying to find his course of negotiation with the Hanford Negotiating Committee.

The Court: Well, I will overrule the objection.

A. Yes, there were meetings held in the late part of 1955. [821]

Q. (By Mr. Etter): And did you at any time act, Mr. Rossman, as a representative of the unions involved?

A. I represented my own local union, yes.

Q. And you participated, did you, in certain of these negotiations to which you refer with the Hanford Contractors Negotiating Committee?

A. Yes, sir.

Q. And did you, during the time that you negotiated, receive proposals from them having to do with contracts on behalf of the members that they purported to represent?

Mr. DeGarmo: Just a moment, if your Honor please.

Now, in order that the record may be clear, I wish again to show a further objection to this question upon the ground, first, that any negotiations with the Hanford Contractors Negotiating Committee cannot, under any circumstances, be binding upon the plaintiff until such time as they show that the Hanford Contractors Negotiating Committee was an authorized bargaining representative for and represented the plaintiff in this action; and I wish the

(Testimony of Arthur A. Rossman.)

record to be very clear that I am objecting to any questions as to negotiations between the various unions and the Hanford Contractors Negotiating Committee upon the ground that they can, [822] under no circumstances, be binding upon the plaintiff and are, therefore, incompetent and irrelevant to any issue in this case.

The Court: Well, I have that in mind, Mr. DeGarmo. I certainly would not consider anything here as binding upon the plaintiff unless it is shown that the people engaged in these conferences were authorized to represent the plaintiff. I want to allow every proper opportunity to the defendants to forward their defense here and I am receiving this only insofar as it may have a bearing on what was the agreement and arrangement under the so-called Hanford Contract, and then, of course, it will not bind the plaintiff unless it is shown that the plaintiff in some capacity adopted or agreed to it or came into it subsequently. I have that clearly in mind.

Mr. DeGarmo: As I stated, primarily for the record.

The Court: All right, the record will show your objection, of course. You may proceed.

Mr. DeGarmo: May it be understood that I have a continuing objection?

The Court: Yes, the record may so show.

Mr. Etter: As I understand counsel's objection, so I have it correctly, as to any period, [823] apparently 1955, counsel is contending that Morrison-

(Testimony of Arthur A. Rossman.)

Knudsen is not bound by any act of the Contracting Committee?

Mr. DeGarmo: That is correct.

Mr. Etter: Is that his position?

Mr. DeGarmo: That is correct. 1955 or 1956 or any other time.

Mr. Etter: All right, that is clear.

The Clerk: I have marked the Defendants' 12 for identification.

Q. (By Mr. Etter): Now, as I understand it, Mr. Rossman, from testimony of Mr. Dunn, the plaintiff Morrison-Knudsen commenced work on the project in November and your men were working on that particular part in the Hanford Works Project on Morrison-Knudsen work either on December the 9th, December 9th or December 12th, I think it was Area 100-H, or something like that, if I am not mistaken?

A. Yes, at about that time they started——

Q. At about that time they started?

A. ——excavation.

Q. You knew and were acquainted, were you, with Mr. Ramon Reed, who was the works project manager of Morrison-Knudsen Company at that time?

A. Yes, sir.

Q. And did you, likewise, know Mr. [824] Knack?

A. Yes; on Mr. Reed, I'm not sure just when I met him. It was during the time, about that time.

Q. It was about that time?

(Testimony of Arthur A. Rossman.)

A. Yes. But Mr. Knack I have known for a number of years.

Q. I see. Had Morrison-Knudsen advised you at any time in writing or by word of mouth, either through Mr. Knack, Mr. Reed, or anybody else, that as a contractor on the Hanford Works Project, they were completely and wholly independent of any negotiating committee or committee of contractors having anything to do with negotiation of any contract on that project? A. No.

Mr. DeGarmo: Just a minute. I object to that question upon the ground that it is extremely leading and it calls for a negative inference. The question is, what did we notify them, if anything.

Mr. Etter: Well, put it this way——

Mr. DeGarmo: I object to the question upon the grounds that it is leading.

Q. (By Mr. Etter): I will put it this way: Were you notified at any time by Morrison-Knudsen with respect to anybody representing them on the project? A. No.

Q. You were not? A. No. [825]

Q. Neither affirmatively or negatively, I guess?

A. That's right.

Q. That's right. But, now, on December 15, 1955, from the testimony, there were men of yours who were working on that area that Morrison-Knudsen had contracted to do particular work?

A. Yes, on or about the 15th of December. I am not sure as to the dates.

Q. I see. Well, now, do you recall receiving, or,

(Testimony of Arthur A. Rossman.)

rather, can you, without disclosing anything, if you will just examine the letter and the attachment, I want to inquire about it.

Mr. Etter: It is Defendant Engineers' Exhibit No. 12, Mr. DeGarmo.

A. Yes, I recall that.

Q. You recall receiving this, do you, this Exhibit 12 for identification? A. Yes.

Q. And you are acquainted with Mr. McCaffree's signature? A. Yes, sir.

Q. That's right. Now, do you recall——

The Court: That is already in evidence, isn't it?

Mr. DeGarmo: No, this is not, your Honor.

Mr. Etter: At this time, I will offer it as [826] being a proposal.

The Court: What is the number?

The Clerk: It is number 12.

Mr. Etter: It is number 12.

The Court: Oh, it hasn't been offered?

Mr. Etter: No, I will offer it at this time, your Honor.

Mr. DeGarmo: Well, my opposition to it, if your Honor please, is there has been no showing whatever that there was any proposal made on behalf of Morrison-Knudsen, Inc., or by any person authorized in any way, shape or form to make any proposal on behalf of Morrison-Knudsen, Inc.

The Court: Well, in view of the situation here, the Court's view that the defendants should be permitted to show the course of dealing and the arrangement between the defendants and this com-

(Testimony of Arthur A. Rossman.)

mittee or committees that were representing the employers in the making and carrying out and the cancellation, for that matter, of the Hanford Agreement, bearing in mind, of course, that all this is not in any way binding on the plaintiff unless plaintiff can be shown to be connected up with it by agreement or contract or in some fashion——

Mr. Etter: That is correct.

The Court: ——as that, and the record may show [827] a continuing objection. Well, this is to a specific document, of course.

Mr. DeGarmo: I think I should make a further objection that just occurred to me, if your Honor please, to this document, that, according to the record in this case, the agreement—I don't know on whose behalf this purports to be, I don't think it makes any difference on whose behalf—the document, as I gather it, as to date is December 15, 1955, and I call your Honor's attention to the fact that the written agreements in this case, Plaintiff's Exhibits 2 and 3, that No. 2 is dated December 19, 1955, which antedates the date of the letter proposals before your Honor, Exhibit 3 is dated December 24, 1955, which also antedates the agreement, and, therefore, it must be conclusively presumed, as a matter of law, that any negotiations on behalf of Morrison-Knudsen Company, Inc., and these defendants, who are signatories to these agreements, were precluded by the agreements and incorporated therein in the written agreements 2 and 3.

The Court: Well, it will be admitted.

(Testimony of Arthur A. Rossman.)

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit No. 12.)

Q. (By Mr. Etter): From '52 to '55, it has been testified [828] to, I think, by Mr. Knapp that the number of contractors on the Hanford Project varied and he has a high of I think he said, 100. Do you recall that, Mr. Rossman?

A. Yes, approximately a maximum of 100, including the specialty contractors and subcontractors.

Q. I see. Now, within your knowledge, each year did your committee, that is, the union representatives and the Hanford Contractors Negotiating Committee, purporting to represent employers on the Hanford Works Project with A.E.C. contracts, negotiate agreements from year to year?

A. Yes, we dealt with the committee; we never dealt separately with any contractor unless it was a dispute.

Q. I see. Now, was it customary at any time during that period, or did you at any time during that period or anyone else that you know of, secure written or oral authorizations of authority from all of the contractors who came on the project for an agency delegation by them through the Hanford Contractors Negotiating Committee before you negotiated with that committee?

A. No, the contractors negotiating——

Mr. DeGarmo: Just a minute——

The Court: Just a minute.

Mr. DeGarmo: May I state an objection?

(Testimony of Arthur A. Rossman.)

The Court: Wait until Mr. DeGarmo makes an objection. [829]

Mr. DeGarmo: I think this will be a continuing objection. I wish it to be shown that the Hanford Contractors Negotiating Committee agreement, which is the agreement in evidence here as Plaintiff's Exhibit 6, states upon its face that it is an agreement between the signatory construction contractors, represented and acting for contractors who presently or during the life of this agreement become signatory to this agreement, and therefore this is an attempt to vary the terms of the document itself, which states that it only purports to be—he says that this Hanford Contractors Negotiating Committee, in his questions he now has restricted it “purporting to act on behalf of the contractors.” They don't purport to act except for those who become signatory to the construction agreement by its specific terms and, therefore, I think that any question which states that they “purport to” is contrary to the document itself.

Mr. Etter: Doesn't that present a problem of how you become signatory? I would like to ask Mr. Rossman one other question.

Q. Mr. Rossman, have you seen contracts, or this contract, before? You have one, do you not?

A. Yes, sir.

Mr. Etter: I think that is the one. Which [830] one were you referring to, counsel?

Mr. DeGarmo: The one you have in your hand.

Mr. Etter: The one I have in my hand.

(Testimony of Arthur A. Rossman.)

Q. Is this it (indicating)?

A. The Hanford Works Agreement.

Q. You have one precisely the same over there, do you not? A. I believe so.

Q. That's right. From '52 to '55, did any of the contractors who were working on that project under A.E.C. contracts and who hired Operating Engineers ever sign that contract individually?

A. To the best of my knowledge, no.

Q. They did not? A. No.

Q. And, to the best of your knowledge, was it a practice for any contractor, no matter who it was, on that project with an A.E.C. contract, to sign this so-called Hanford Agreement? A. No.

The Court: The record may show your continuing objection, if you wish here, Mr. DeGarmo.

Mr. DeGarmo: Yes, I do wish it to show.

The Court: All right.

Mr. DeGarmo: Because I think it is contrary to the document itself; also, to the fact of the [831] agreement.

The Court: All right, go ahead.

Q. (By Mr. Etter): And so far as you know, you did not at any time, as I understand it, Mr. Rossman, ever secure specific and special authorizations from any of the contractors or any or all of them on that project with A.E.C. contracts from 1952 to 1955 for delegation of authority to the bargaining committee? A. No.

Q. Now, as I understand it, you continued to

(Testimony of Arthur A. Rossman.)

negotiate in January and thereafter with the Hanford Contractors Negotiating Committee?

A. Yes, sir.

Q. Did you at any time negotiate with the Associated General Contractors during the time from January the 1st until about the 8th or 10th, when this delegation or assumed bargaining right was assigned to A.G.C.?

A. With reference to the Hanford Project?

Q. Yes. A. No.

Q. You did not? A. No.

Q. Were your negotiations with reference to the Hanford Project carried on exclusively during that period of time with the Hanford Contractors Negotiating Committee? [832] A. I believe so.

Q. And during that time, can you tell me about how many meetings, if you recall, that you attended as a union representative with representatives of the Hanford Contractors Negotiating Committee, purporting to represent all of the contractors on the Hanford Project with A.E.C. contracts?

A. During what period of time?

Q. From January the 1st until the assignment over, whenever it may have been, 8th or 10th of March, something like that?

A. I can't tell you exactly. A number of times, two, three, six.

Q. Well, were these all formal meetings?

A. No.

Q. How many formal, arranged meetings do you recall, if you do recall?

(Testimony of Arthur A. Rossman.)

A. I recall at least two, I think there were one or two more.

Q. And at any of these meetings, was any representative of Morrison-Knudsen present?

A. Yes.

Q. Who was there? A. Ray Reed.

Q. And do you recall whether he was present at one meeting [833] or more than one meeting?

A. Two.

Q. Did he make any statement at any time?

A. At least two.

Q. Beg your pardon?

A. I would say at least two.

Q. At least two.

The Court: Who was that you said was present?

A. Ray Reed.

Q. (By Mr. Etter): Project manager?

A. Yes.

The Court: Yes, I know who you mean.

The Clerk: I have marked the Defendants' 13.

Q. (By Mr. Etter): Now, Mr. Rossman, were you in attendance at the meeting of January the 5th in the Labor Hall at Pasco, Washington, in the afternoon at about 2:30, between representatives or a number of representatives of the labor unions interested in the Hanford Project and Mr. Knack, I believe it was, and Mr. Reed? A. Yes, sir.

Q. You were. And do you recall that these men who have been named were present, that is, you and Mr. Dunn and Mr. Knapp and others, is that correct? A. Yes.

(Testimony of Arthur A. Rossman.)

Q. Do you remember any others that were there that you can [834] recollect at this time?

A. Well, I believe Sewell Davis was there, Bud Shirk.

Q. Bud Shirk. Mr. Clarey?

A. Mr. Clarey.

Q. Anybody else?

A. Mr. King, I believe, was present.

Q. Mr. King. What is Mr. King's capacity?

A. Millwrights, Carpenters and Millwrights.

Q. I see. And would you agree that there were approximately, say, 15 of the union people that were there, in addition to the two men from Morrison-Knudsen? A. That would be a close estimate.

Q. Now, it has been testified it was a pre-job conference. I would like to have you tell us, if you will, what, as you remember, was said at the meeting by the representatives of the plaintiff and, likewise, by the unions?

A. Well, we were all interested when a good-sized job starts to determine the requirements for members to be employed on the jobs, the conditions under which they will work, the approximate work schedule. There are many phases of some of these jobs. There was excavation, steel erection, piping work, electrical work. It helps us to know in advance what the approximate schedule of the construction schedule will be.

Q. I see. Is that the purpose, ordinarily, of a pre-job [835] conference?

(Testimony of Arthur A. Rossman.)

A. Ordinarily, that is the purpose of a pre-job conference.

Q. Is that the usual or the unusual thing to have a pre-job conference on a large job?

A. It is the usual procedure.

Q. It is the usual procedure?

A. We sometimes have pre-bid conferences.

Q. Pre-bid conferences? A. That's right.

Q. Is that a conference, I presume, in which you advise of costs and number of men, one thing and another, prior to the bid of a contract?

A. That's right, we have those occasionally.

Q. You have those occasionally. But the pre-job conference on a fairly substantially large job is the ordinary procedure, is that correct?

A. That is correct. Actually, this particular pre-job conference was held sometime after the job actually started, but it wasn't into its major aspects as yet.

Q. I see. As a matter of fact, this pre-job conference, so far there had been one part of the excavation work that had been completed, is that correct? A. Yes.

Q. And which had served as employment for some of your members? [836] A. That's right.

Q. And the Teamsters, I think, is that correct?

A. Yes, I believe so.

Q. In December. All right, now, was there some discussion held at that time with regard to the existing conditions of the contract on the Hanford Project, do you recall? A. At the——

(Testimony of Arthur A. Rossman.)

Q. At the pre-job conference? A. Yes.

Q. And will you tell us who had the conversation, as you recall it?

A. At the meeting or prior to the meeting? There were two meetings that day, you know.

Q. There were two meetings. All right, at the first meeting, was there anything discussed by the pre-job conference at the first meeting?

A. I don't believe so, other than there was mention made where and when it would be held.

Q. Where it would be. That was in the morning, wasn't it, the first meeting? A. That's right.

Q. And the second meeting was the pre-job conference, the one I am directing your attention to now, is that correct? A. That's right. [837]

Q. All right, at that second meeting, who had some conversation, what was it that had to do with the existing conditions and contract at the Hanford Works Project?

A. Well, by virtue of the fact that the Teamsters, the Engineers, and the Cement Masons were the only three unions involved or interested or concerned with bus transportation and job isolation pay and the parking lot at Richland, after the first meeting we delegated or designated Lee——

Mr. DeGarmo: Just a minute, just a minute. If your Honor please, I object to this testimony upon the ground that it is referring to some understanding or arrangement held outside of the hearing of any representative of the plaintiff in this action. He

(Testimony of Arthur A. Rossman.)

can tell what was said at the meeting, but what they agreed on beforehand——

The Court: Yes, I think the testimony should be confined to the meeting in which a representative of the plaintiff was present.

Mr. Etter: Yes.

The Court: Is this the meeting of the 5th of January, 1956?

A. Yes, sir.

Mr. Etter: Yes, the afternoon of the 5th. [838]

Q. Just tell us about the conversation.

A. Well, Mr. Knapp, Charlie Knapp, near the end of the meeting, other things had been disposed of, the work schedule and the number of men to be employed and the approximate length of time that would be consumed in completing the contract, and Mr. Knapp asked what the company's intention was with regard to bus transportation and job isolation pay in view of the fact that it had been questioned within the past week or two.

The Court: Pardon me just a moment. I don't wish to unduly restrict defendants here and I think this came up in connection with the testimony of another witness. While I think that the testimony should be confined, so far as making it binding on the plaintiff is concerned, to what was actually said and done at a meeting at which the plaintiff's representatives were present, nevertheless if something that happened outside is necessary to explain and to enable people to understand what was done in the

(Testimony of Arthur A. Rossman.)

conference, I think that that could be done, that could be shown.

Mr. Etter: All right.

The Court: For instance, what I have in mind was, if somebody asked a question which, by pre-arrangement, was to be asked for all of them, I think that you should be able to show that. [839]

Mr. Etter: Well, that is what I want to show.

The Court: Over objection of counsel, if he wishes to make the objection.

Mr. DeGarmo: I think only if that prearrangement was brought to the information of the plaintiff, if your Honor please. What are they relying upon, estoppel?

The Court: I don't know what they are relying upon, but if somebody asked a question and the others sat there and said nothing and they understood it was to be asked for all of them, I think that they have a right to show that that was the situation.

Mr. DeGarmo: Well, I submit, if your Honor please, unless they can show that that information was brought home to the plaintiff. Now, do you mean that if in a meeting if someone, some person speaks up and he says, asks a question, that he can create a contract on behalf of other people that the other contracting party knows nothing about? That is what they are relying upon as a contract here. Please remember that they have pleaded an agreement.

The Court: I think that depends upon the situa-

(Testimony of Arthur A. Rossman.)

tion. If labor unions and an employer have a conference, I assume that the employer is realistic enough to understand that those people are [840] there representing their unions and what is said in behalf of one applies to all of them; that it isn't as if three labor union representatives met with one employer for a particular job. I don't think that that can be divided up into separate compartments as to each union and each union's representative; I think if the employer says, "Yes, we will give you the job pay," and says it to one of the representatives, he is saying it to all of them. Maybe I am wrong on that, I will hear your argument on it, but at least under that theory, I think they are entitled to show or bring out this testimony and evidence which I have in mind.

Mr. DeGarmo: Well, I don't think that this is the time to argue it particularly, but I wish to point out to your Honor this distinction in the ruling that you are making:

I think that if your Honor, as the Judge sitting here, might have the reason and might have cause to hold that if a statement was made under such circumstances, that it would be understood by a party to be binding upon all, that then you might find that a contract was made with all, but what I am objecting to is some prearrangement between the parties not stated to the plaintiff. And I think that is absolutely barred from this testimony unless they can show that this [841] prearrangement was brought home to the plaintiff.

(Testimony of Arthur A. Rossman.)

Now, one witness has already testified here, and unless they want to dispute their own witness, and I don't think they can, he has testified that there was no such statement made. Now, I think the facts and circumstances in the meeting itself can be shown, because we were there, but what I am objecting to is some preliminary conference at which they reach some agreement between themselves, not communicated to the plaintiff.

The Court: This is a trial before the Court, Mr. DeGarmo——

Mr. DeGarmo: Yes, I appreciate that.

The Court: I don't wish to have to stop here and hear counsel's argument on every phase of this case as to what the effect of these particular negotiations are, whether a plaintiff is bound or is not bound, and rather than be too exclusive, I think I should hear the other side and let everything in that I think might be of value and then hear you on the legal effect of it after the conclusion of the case. I don't want to have to stop and argue the law points every time we have a witness put on the stand. This case would go into August here instead of July, as it promises to now, the way we are going. [842]

So that I am going to let this in and, without making any decision, my remarks were simply directed to the point that it might be material, that it might have some bearing on a decision which I might make later on. I am not making the decision now; don't misunderstand me on that.

(Testimony of Arthur A. Rossman.)

Mr. DeGarmo: Yes, I appreciate that.

The Court: And the record may show your objection.

Mr. DeGarmo: And the record is clear.

The Court: All right. I don't think that situation even exists as to this, but I don't want to be too exclusive, and I think that if an inference is to be drawn, why, somebody sits silent in a conference, he ought to have a right, because it was arranged that this man was to speak for him, certainly it is a matter of common sense, I think, that he should be permitted to show that.

Court will recess now until 2 o'clock. I propose to run until 5 today rather than 4:30.

(Whereupon, the trial in the instant cause was recessed until 2 o'clock p.m. this date.) [843]

June 17, 1957

(Whereupon, the trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had:)

The Court: Let's see, Mr. Rossman.

ARTHUR A. ROSSMAN

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Resumed)

By Mr. Etter:

Q. Shortly before we adjourned for the noon recess, I asked you, I think, to relate the conversation that occurred at the meeting in the afternoon of January the 5th of 1956, at which certain people were present that you described, including Mr. Knack and, I think, Mr. Reed of Morrison-Knudsen, with respect to the policy, as I understand it, or the employment conditions or otherwise, that were going to prevail. Do you recall me asking you that?

A. Yes. [844]

Q. Will you tell me what that conversation was and what you remember of it, in substance and effect, and who the parties were and what they said, as you recall, please?

A. Yes. Well, that was, as I said, at the late part of the meeting, the meeting was about to break up, and, as I recall it, I was anxious to get away and either catch a plane or get to Spokane by car to another meeting. I was interested in the answer to those questions and when Mr. Charlie Knapp asked the question regarding bus transportation and isolation pay of Mr. Lee Knack——

Q. Do you recall how he asked that?

A. Yes, what their position would be in regard to those items in view of the fact that there had

(Testimony of Arthur A. Rossman.)

been some discussion as to the possible discontinuation of them. And I can't quote the verbatim answer, of course, but I was satisfied with the answer, something said about they had a job to do and were anxious to get on it and get the contract completed, they bid the job on the basis of the conditions as they existed on the job at the time, and they intended to carry those out. I think there was also something said about—by Mr. Knack—to the effect that they were a new contractor on the job and weren't coming in there to establish a [845] precedent.

Q. Do you recall anything further than that?

A. That is about all, as I recall it. I left immediately when I got the answer to that question.

Q. I see. And had there been some arrangement, or can you state yes or no, some arrangement with Mr. Knapp, so far as the Engineers and Teamsters were concerned, to inquire about these specific topics?

Mr. DeGarmo: Did you say Mr. Knack or Mr. Knapp?

Mr. Etter: With Mr. Knapp, had there been any arrangement?

A. Mr. Charlie Knapp?

Q. Yes.

A. Yes, we discussed it prior to going into the meeting.

Q. And what was the understanding that was had with respect to his inquiries?

A. Well——

(Testimony of Arthur A. Rossman.)

Mr. DeGarmo: It is understood that my objection goes to this?

The Court: Yes.

A. The problem for the three unions was identical, for the three unions involved, all the other crafts having negotiated their travel pay, transportation items. We saw no point in me asking for the Engineers, Mr. Davis for the Teamsters, and Mr. Knapp for the Cement Masons. [846] If it applied to one, it would certainly apply to all. That was, at least, my assumption, and had Mr. Knapp failed to ask the question, I undoubtedly would have asked it.

Q. (By Mr. Etter): I see. Now, you say it involved you three unions, specifically?

A. That's right.

Q. The ones you mentioned, Mr. Knapp's, the Operating Engineers, and the Teamsters Union, is that correct?

A. That is correct.

Q. All right. Now, thereafter, after January the 5th, I gather from your testimony you continued to negotiate with the Hanford Contractors Negotiating Committee?

A. Yes.

Q. Now I will hand the Defendants' Exhibit for identification 13 to you and ask you to examine that for just a moment, Mr. Rossman, and tell me if you recognize it?

A. Yes, I received it.

Q. And, without disclosing its contents, you did receive it?

A. Yes, I did.

Q. From whom?

(Testimony of Arthur A. Rossman.)

A. Kenneth M. McCaffree, executive secretary to the Hanford Contractors Negotiating Committee.

Q. I see, all right. [847]

Mr. Etter: You have seen this?

Mr. DeGarmo: Yes, I have.

Mr. Etter: I would like to move for the admission of the Defendants' Exhibit 13, your Honor, in evidence.

Mr. DeGarmo: I object to the admission of the document upon all of the grounds previously stated with respect to Defendants' Exhibit 12 and upon the further ground that, if your Honor will observe the second page of the document about the last paragraph, before the place for signatures, it is stated: "This memorandum of agreement is explicitly recommended by the Hanford Contractors Negotiating Committee to construction contractors presently working at the site of the Hanford Works." It doesn't purport to be on behalf of anybody, it is only a recommendation.

Mr. Etter: I concede that it is a proposal for bargaining. The extent of it, of course, is open to debate.

The Court: Well, it will be admitted. I will consider the effect of it later.

Mr. Etter: Yes.

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit No. [848] 13.)

Q. (By Mr. Etter): This was, as it appears to

(Testimony of Arthur A. Rossman.)

be, a proposal, as indicated, from Mr. McCaffree, is that correct? A. Is that the same one?

Q. Yes. A. Yes.

Q. Do you recall that? A. Yes.

Q. Can you tell me whether or not that was accepted by your local? A. No, it was not.

Q. It was not. Handing you at this time Defendants' Exhibit 14 for identification, I will ask you to examine that. A. Yes.

Q. You received that, did you, in March?

A. As most of those proposals were, they are undated.

Q. Well, I mean, other than the date, the month of March? A. Yes, yes.

Q. And, as I understand it, after the 8th of March, any negotiations you held after that, or the 9th, whatever the date might have been, you held them with the A.G.C. people and not this committee?

A. That's right.

Q. That's right. So would you say that you received this [849] prior to the date of the so-called assignment of bargaining rights by Hanford Contractors Committee to the A.G.C.?

A. Yes. I would say that was on or about the 9th or 10th of March.

Q. Well, it would be prior, though, to the assignment of bargaining rights? A. That's right.

Mr. Etter: I move the admission of this, Mr. DeGarmo. It is the other one. I move at this time, your Honor, that Defendants' Exhibit 14 be admitted, which is another proposal, as was 13.

(Testimony of Arthur A. Rossman.)

Mr. DeGarmo: The same grounds of objection as stated with respect to Defendants' 13, if your Honor please.

The Court: It will be admitted on the same basis as 13, then.

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit No. 14.)

Q. (By Mr. Etter): Now, this Exhibit No. 14 was a proposal made by the Hanford Contractors Negotiating Committee to the extent that it is indicated on behalf of the purported contractors represented by that committee, was it, to you? [850]

A. Yes.

Mr. DeGarmo: I think that the document speaks for itself, as to who it is submitted on behalf of. It states it is merely recommended.

Mr. Etter: I stated to the extent it merely qualifies. I am just trying to put it all in, whatever it may purport to be.

Q. It was presented to you, was it not?

A. Yes.

Q. And did the union act with regard to this proposal? A. Yes.

Q. Did they accept or did they reject it?

A. Rejected it.

Q. Now, it was after that date, was it, that you were notified of an assignment of bargaining rights by the Hanford Committee, as indicated by a copy of this letter which is indicated as Defendants' Exhibit No. 10——

(Testimony of Arthur A. Rossman.)

A. Yes. What was that question again?

Mr. Etter: Would you read the question, please?

(Question read.)

A. Yes, while I am not positive on the date on that last exhibit, it would have to have been prior to this because they weren't making any offers after that.

Q. (By Mr. Etter): After that. And after you had received this letter of March 8th, there were no further [851] negotiations with the Hanford Contractors Negotiating Committee, as such?

A. That's right.

Q. But all negotiations thereafter were with, as I understand it, the A.G.C. representatives?

A. That's right, with representatives of the Hanford Committee sitting in at times.

Q. Sitting in at times? A. That's right.

Q. I see. And it was on the date indicated, the 10th when, during the first meeting, was it, with the A.G.C. after this assignment of bargaining rights indicated in the letter of March 8th, or Defendants' Exhibit 10, that this proposal, which is Defendants' Exhibit 7, was made to your group?

A. Yes. While, again, it is undated in the type, it is indicated here in pencil and I will have to assume that that is the correct date.

Q. And, likewise, as is indicated there, that was rejected? A. That's right. [852]

(Testimony of Arthur A. Rossman.)

Cross-Examination

By Mr. DeGarmo:

Q. Mr. Rossman, were you present in court when Mr. Knapp stated that he had first been under the impression that [860] Mr. Davis was at this afternoon meeting on the 5th of January, 1956, but had discovered that that was in error? I just want to know if you were present in court when he so testified?

A. I think I have been present all during these proceedings.

Q. Well, did you hear him so testify?

A. What was it he said, again?

Q. That he had at first been under the impression that Mr. Sewell Davis was at this afternoon meeting on the 5th of January, 1956, but that he had discovered, through checking the minutes and the list of people there, that that was not so?

A. I seem to recall that.

The Court: Who is Mr. Davis' successor in the Teamsters?

Mr. Carey: Pardon?

The Court: Who was Mr. Davis' successor in the Teamsters?

Mr. Etter: Mr. Lewis.

Mr. Carey: Mr. Lewis.

Mr. DeGarmo: Robert Lewis.

The Court: I suppose the reporter could take time enough to straighten it out, but I was under

(Testimony of Arthur A. Rossman.)

the impression that he first thought Mr. Lewis was there and then discovered his mistake and learned that Mr. [861] Davis, who is now deceased, was there. Maybe I am wrong about that.

Mr. DeGarmo: Mr. Davis was alive at that time.

The Court: Oh.

The Witness: I'm not sure either one of them were there at the time. Sewell Davis was present that day, however.

Q. (By Mr. DeGarmo): He was present at a morning meeting, was he not, which was held in Richland at which you were present?

A. Yes, I saw him that day.

Q. You are sure that he was present at the morning meeting?

A. One or the other of them, or that I saw him that day, yes.

Q. Well, now, let's go back a moment. Who was present at the afternoon meeting on the 5th of January representing the Teamsters, if anybody?

A. I don't know.

Q. Well, do you not know that there was someone there, or do you know who the particular person was?

A. I am not sure there was anyone there representing the Teamsters. I have a feeling there was. I know Mr. Charlie Knapp spoke for all of us.

Q. Yes. Well, I notice that in answer to a question of your counsel, you stated there was some arrangement by [862] which Mr. Knapp was speaking for all three, that is, the Operating Engineers,

(Testimony of Arthur A. Rossman.)

Teamsters, and the Cement Finishers, and I also noted in your testimony this morning, Mr. Rossman, that you started to talk about a conference held in a parking lot immediately before the January 5th afternoon meeting. Now, did you see Mr. Sewell Davis in the parking lot?

A. I couldn't say.

Q. Well, when was the so-called arrangement and with whom?

A. With myself, Bill Dunn was there, Charlie Knapp was there, and I presume some representative of the Teamsters. He would have to have been to give Mr. Knapp the authority to speak for us. We assembled after the morning meeting at the parking lot where we had our cars in Richland. I am not even sure where we ate lunch. It might have been at the Desert Inn or it might have been down in Pasco. We were together all during the period, virtually all the time, during the period between the two sessions at one place or another.

Q. That is what I am trying to find out, Mr. Rossman, is who is this individual on behalf of the Teamsters that delegated the authority to Mr. Knapp to speak for the Teamsters?

A. Not being positive, I don't know.

Q. Well, now, prior to the time that Mr. Knapp asked this [863] question at the afternoon meeting of January 5th, 1956, did he make any statement to Mr. Knack as to who he was speaking for?

A. Did Mr. Knapp—Mr. Knack or Knapp?

Q. Mr. Knapp, who, you say, was the spokesman

(Testimony of Arthur A. Rossman.)

by agreement. Did he make any statement to Mr. Knack, K-n-a-c-k, as to whom he, Mr. Knapp, was speaking for when he asked the question?

A. I don't remember whether he specifically mentioned the Teamsters and the Engineers or not, but, as I previously stated, we were all in the same position with reference to job isolation pay and bus transportation and an answer to the Cement Masons would certainly apply to the Teamsters and Engineers.

Q. Well, you have already stated, Mr. Rossman, that the answer to this question was peculiarly interesting to only the Operating Engineers, Teamsters, and Cement Finishers, haven't you, at this meeting? A. I believe so.

Q. Now, that is not a fact, is it?

A. In what way?

Q. As of January 5th, 1956, there were a number of other crafts that were equally interested in the question of job transportation and isolation pay and present at this meeting? [864]

A. It is my recollection that all the other crafts, with the possible exception of the Carpenters, had settled by that time.

Q. Well, are you as positive of that as you are of the statement that you attribute to Mr. Knack that day? A. No.

Q. As a matter of fact, the Carpenters didn't sign until after that date, isn't that correct?

A. I don't know.

(Testimony of Arthur A. Rossman.)

Q. As a matter of fact, the Laborers hadn't signed as of that date, had they?

A. No, I seem to recall the Laborers signed at some subsequent date out at Richland at which I was also present.

Q. And they were interested in transportation and isolation pay, were they not?

A. If it wasn't settled, I would presume so.

Q. And the Carpenters were interested in transportation and isolation pay, were they not?

A. Well, I can't speak for the Carpenters.

Q. Well, you know that they had been receiving such, do you not, under the Hanford Works Agreement?

A. I'm not even sure they were receiving the identical isolation pay that we were. Some of the other crafts had different travel conditions than we had. [865]

Q. How about the Millwrights, were they interested?

A. Yes, but I am quite positive they had a different arrangement prior to the time of these negotiations.

Q. You are sure of that?

A. No, I am not.

Q. How about the Boilermakers?

A. Well, I know from tradition and practice the Boilermakers negotiate for the eleven western states with their own contractors and impose their own agreement on any contractor that works in that area, so they had no particular problem.

(Testimony of Arthur A. Rossman.)

Q. How about the Ironworkers, had they signed a separate agreement, area agreement, at that time?

A. I don't know.

Q. Were they interested in isolation pay and job transportation?

A. If I told you, I would be guessing; I don't know.

Q. Well, then, when you stated this morning that the only three crafts present at this meeting who were interested in job transportation and isolation pay were the Operating Engineers, the Teamsters, and the Cement Finishers, that was not a correct statement, was it, Mr. Rossman?

A. Partly, yes, I believe. I know that some of the other crafts had already negotiated something in lieu of bus [866] transportation and were not riding the busses.

Q. Well, now, you participated in the meeting that morning, did you not, Mr. Rossman?

A. Yes.

Q. At Richland? A. Yes, sir.

Q. Will you tell us who were present at that meeting?

A. Some contractor representatives. Mr. DeGarmo, in addition to the meetings I attended at Richland and Pasco and Spokane during this process, I was attending meetings in Idaho Falls, Pocatello, down in the Columbia Basin, the Reclamation Bureau, it was pretty hard for me to recollect what took place at each specific meeting. I cover a state and a half in these negotiations.

(Testimony of Arthur A. Rossman.)

Q. Well, I will attempt to refresh your recollection somewhat. Was Mr. Lee Knack present at the morning meeting at Richland?

A. Yes, I believe he was.

Q. That meeting was held in one of the upstairs offices in the Administration Building of the Atomic Energy Commission?

A. I believe it was held in the room, in the conference room, adjacent to one of the Atomic Energy Commission offices. [867]

Q. Well, in any event, it was in the Administration Building at Richland; you do remember that?

A. I believe that one was. Occasionally, if the meeting was large, we went to a building next door down the street a door or two.

Q. Can you give us any recollection, Mr. Rossman, of what happened at the morning meeting? Mr. Rossman, first let me ask you if Mr. Knapp was there. A. I'm not sure.

Q. Well, again, I will attempt to refresh your recollection. Do you recall, Mr. Rossman, that at this morning meeting Mr. Kenneth McCaffree was there, Mr. Knapp was there, and there was considerable discussion between them as to exactly whom Mr. Knapp represented?

A. No, I don't recall any such discussion.

Q. Do you recall that at that meeting Mr. Knapp accused Mr. McCaffree of stealing members away or detracting them away from the Pasco-Kennewick Building Trades Council by entering into separate negotiations with them?

(Testimony of Arthur A. Rossman.)

A. I remember there was some discussion about Mr. McCaffree being instrumental in the breaking up of the Pasco-Kennewick Building Trades Council, yes.

Q. And you don't remember that on a number of occasions, not once but on a number of occasions, Mr. Knack directed [868] the direct question to Mr. Knapp, "Who do you represent?"

A. Yes, now that you mention it, I recall that question.

Q. And do you remember that Mr. Knapp refused and did not answer that question at any time during that meeting as to who he represented?

A. I don't recall that, what his answer was.

Q. Well, you don't remember his stating who he represented, do you?

A. The Pasco-Kennewick Building Trades Council and the affiliated unions.

Q. But did he state who the unions were that were affiliated at that time and whom he represented

A. I don't know whether he did or not.

Q. Do you recall that at that morning meeting, Mr. Rossman, Mr. Knack, and I am speaking of Mr. K-n-a-c-k now, Mr. Knack, stated to you that the Morrison-Knudsen Company stood in a little different position than the other contractors at Hanford because they had a contract with you Operating Engineers 370 and with the Teamsters and Mr. Davis was present in the meeting at the time,

(Testimony of Arthur A. Rossman.)

Sewell Davis? Do you remember that statement having been made at the morning meeting?

A. No, I can't say that I do, although it might have been asked.

Q. Do you deny it, sir? [869]

A. No, I don't deny it; I just don't remember.

Q. You have mentioned, Mr. Rossman, that there were members of the Operating Engineers present on the Hanford Project's work which Morrison-Knudsen Company had contracted to do with the Atomic Energy Commission under the contract, Plaintiff's Exhibit 1, in the month of December, 1955. I wish to ask you if those men were men employed by Morrison-Knudsen Company or if they were men employed by a subcontractor of Morrison-Knudsen Company?

A. Most of them, perhaps all of them, were employed by the Irwin Company, a subcontractor of the excavation contract.

Q. Well, now, as a matter of fact, Mr. Rossman, you make contractors with subcontractors as well as with prime contractors, do you not?

A. Not ordinarily. We hold the prime contractor responsible for the activities of the subcontractor. After all, Mr. Irwin had no contract with the Atomic Energy Commission, his contract was with Morrison-Knudsen, I presume. They usually are.

Q. Well, do you make no contracts with an organization such as the Irwin Construction Company?

A. I don't think we had one with them.

(Testimony of Arthur A. Rossman.)

Q. Well, that wasn't the question, whether you had one with [870] them; I am asking if you make such contracts with such organizations?

A. We would if they took prime contracts, and the Irwin Company didn't do just subcontracts, they might be subcontracting on one project and a prime contractor on another.

Q. You have stated that you knew the men were there because of the records which were kept by the office of the Operating Engineers, is that correct?

A. That's right.

Q. Now, would those records also show, Mr. Rossman, whether there were operating engineers working for contractors on the Hanford Project under contract with the Army Engineers?

A. I presume so.

Q. Does Mr. Dunn have access to those records?

A. They are not in his office, they are in the Spokane office. He has duplicates in his office. As explained this morning, the referral slips are made out in triplicate. The original goes to the employer, the duplicate stays in the branch office, and the triplicate comes to the main office in Spokane for the permanent records, and, in a great many cases, the men aren't dispatched to the job. In the case of Mr. Irwin of the Irwin Construction Company, I doubt very much if the men were [871] dispatched to the Irwin Company for a specific job, because Irwin had members of ours on his pay roll, perhaps, for a year or two prior to the time he

(Testimony of Arthur A. Rossman.)

went on that job, and he just transferred that job there and he stayed.

Q. You said that you knew the men were there because of the records in your office?

A. Yes.

Q. Well, would not the same information be there with respect to other contractors on the project employing Operating Engineers?

A. Yes, for the most part. The records aren't 100 per cent accurate. Men are referred to an employer to go to work and, until he reports back that he is out of work, we assume he is still there. He might leave and go to some foreign country to a job and we wouldn't know he was gone until he sent his dues in from some other place.

Q. Mr. Rossman, were there Operating Engineers working in the Hanford Works Area in 1955 and 1956 under the terms and provisions of Exhibit 3, which is the Operating Engineers' agreement?

A. Not for any Atomic Energy Commission contractor.

Q. Was that the question I asked you, Mr. Rossman?

Mr. DeGarmo: Will you read the question?

(Question read.) [872]

Q. (By Mr. DeGarmo): Now, I said 1955. Exhibit 3 is only the 1956 agreement. There was an agreement in 1955, wasn't there, with the A.G.C.?

A. Yes, sir.

(Testimony of Arthur A. Rossman.)

Q. All right, just include the '55 and '56 agreements, then. I asked you if there were not men working there under those two agreements?

A. I believe we had some men working for some Corps of Engineers defense installation out there.

Q. You stated, in answer to a question from your counsel this morning, Mr. Rossman, that, to your knowledge, no contractor working at Hanford Works with the Atomic Energy Commission had ever signed the Hanford Works Agreement, which I think is here as Exhibit No. 6. Did you mean by your answer to state that you knew there were none or that you did not know of any?

A. I knew of none after 1952. The negotiating committee signed for all contractors having work on the project.

Q. Well, do you know, as a matter of fact, that there were no contractors—that there was no contractor, who ever actually signed the Hanford Works Agreement?

A. None signed, as far as I am concerned, as far as the Operating Engineers are concerned. They may have signed with the Building Trades Council, I'm not sure of that.

Q. Mr. Rossman, under what contract with Morrison-Knudsen [873] Company were the Operating Engineers employed by it on the Hanford Works Project working during the period January 1, 1956, to March 22nd, 1956?

A. They were working under the terms and conditions of the old Hanford Agreement.

(Testimony of Arthur A. Rossman.)

Q. Well, that was not an agreement with Morrison-Knudsen Company, was it, Mr. Rossman?

A. I assumed it was. They bid the job under the terms of that contract and they were one of the Hanford construction contractors.

Q. Were you familiar with the contract which they had with the Atomic Energy Commission?

A. No, I never saw it until I saw it in the court-house.

Q. Well, you knew that the Hanford Works Agreement itself was terminated on December 31, 1955, did you not?

A. I have a letter that says it was, yes.

Q. Well, now, what written agreement was there, Mr. Rossman, which provided for the payment of health and welfare on the wages of Operating Engineers between January 1, 1956 and March 22, 1956?

A. Well, it was a provision of the Hanford contract. I checked with my health and welfare administrator on Friday, and in 1956 and in 1955 there were over 200, in one case 278, contractors subscribed to the health and welfare plan, and only 45 or 50 of them were members [874] of the A.G.C., if that answers your question.

Q. I don't think it does. I want to know under what written contract, if any, the health and welfare payments were received by the Operating Engineers' health and welfare fund from Morrison-Knudsen Company between the period of January 1 and March 22nd, 1956?

(Testimony of Arthur A. Rossman.)

A. Well, there is a trust instrument entitled the Engineers—A.G.C. and other construction contractors' Health and Welfare Fund. It doesn't just say "A.G.C." Any time a contractor comes into the area and starts work, we furnish him with a copy of that trust fund, monthly report forms, contribution forms, and he is in business.

Q. You also take an agreement from him, do you not, a written agreement, to abide by and pay the payments in accordance with the terms of that agreement?

A. In some cases.

Q. In all cases, do you not? A. No.

Q. Well, let's get back to the question that I asked you: Under what written agreement—I think that is very plain—under what written agreement with Morrison-Knudsen Company were payments made to, and accepted by, the Operating Engineers' Health and Welfare Fund from January 1 to March 22nd, 1956?

A. None that I know of, unless they signed a prior letter [875] of compliance to cover some job in our area. They have had railway work, other work, in our area. I think subsequent to July 1st, 1954, there may conceivably be one in the file. I wouldn't know until I went and checked.

Q. Well, would you check and see if you can find one? You don't need to do it right now, but——

A. I would like to do it right now.

Q. But during this evening I would like to have you check and see if you can find any written agreement with Morrison-Knudsen Company for health

(Testimony of Arthur A. Rossman.)

and welfare. A. Subsequent to July 1st, 1954?

Q. Covering the period January 1 to March 22nd, 1956. There was a provision for health and welfare under the Hanford Works Agreement, was there not? A. That's right.

Q. And it tied right back into the A.G.C. agreement, did it not?

A. I have forgotten the exact language. However, I wrote it. I imagine I would tie that in.

Q. Well, as a matter of fact, there was no health and welfare agreement under the Hanford Works Agreement, was there, except the statement that the contractors would pay health and welfare in accordance with the terms of the agreement which had been negotiated with [876] the A.G.C. Chapters by the Operating Engineers?

A. Well, effective July 1st, 1954, all contractors on the Hanford Project started contributions to the Engineers—A.G.C. Trust Fund, and, to the best of my knowledge, none of them signed to do that, members or non-members of the A.G.C.

Q. Well, Mr. Rossman, as business agent for the Operating Engineers, are you familiar with the fact that there is a criminal penalty for collecting health and welfare benefits without a written agreement with the specific employer making the agreement?

A. I wasn't aware of that.

Q. You never knew of that?

A. I know there is—there is a law against a union collecting health and welfare funds, as such, or an employer. There has to be a trust instrument

(Testimony of Arthur A. Rossman.)

executed and placed on file with the Bureau of Internal Revenue and approved, which has been done in this case.

Q. But you were never aware before that the law required that the agreement be between the employer and the union detailing the terms of payment? A. No.

Q. Under what agreement, Mr. Rossman, did the Operating Engineers receive an increase in pay in the period from January 1 to March 22nd, 1956?

A. By agreement and exchange of letters between Kenneth McCaffree and myself.

Q. An exchange of letters by which you got an increase in pay from Morrison-Knudsen Company?

A. From the Hanford Contractors.

Q. Now, you had negotiated, did you not, an agreement with the Associated General Contractors, Spokane Chapter, Heavy Highway and Engineers, on December 24th of 1955? A. Right.

Q. And that agreement provided for certain specific pay increases, did it not?

A. That's right.

Q. And is it your testimony, Mr. Rossman, that those pay increases which Morrison-Knudsen Company paid to the employees, members of the Operating Engineers, were not paid in accordance with the agreement negotiated in Spokane with the A.G.C.?

A. Well, for many years, the A.G.C. has been recognized as the collective bargaining agent for,

(Testimony of Arthur A. Rossman.)

not only their own members, but also other employers in this area, and their wage rates have been accepted and pre-determined by the Davis-Bacon section of the Labor Department, more than——

Q. Mr. Rossman——

A. ——if I may continue—— [878]

Q. Yes.

A. ——are not the only employers that started paying the increased wage rates on January 1st. All contractors in this area. If they didn't, I was looking them up within a week or ten days.

Q. Mr. Rossman, the contract which was negotiated with the A.G.C. provided that the contract went into effect January 1, 1956, did it not?

A. What was that again?

Q. The contract which was negotiated with the A.G.C., which is Plaintiff's Exhibit 3, provided that it went into effect January 1, 1956, is that correct?

A. That's right.

Q. And is it not a fact that when the wage increases were placed in effect, they were made retroactive and paid back to January 1st of 1956?

A. Yes, as the result of my correspondence with Mr. McCaffree.

Q. Well, just what did Mr. McCaffree have to do with it, now, if you can tell me?

A. I discovered, as I told you a few moments ago, that the contractors on the Hanford Project were not paying the new rates that went into effect on January 1st, 1956, and I wrote him a letter and asked him—he was purportedly representing the

(Testimony of Arthur A. Rossman.)

contractors, all the [879] contractors, on the Hanford Project—and I asked him to notify those contractors to start paying those wage rates.

Q. Did you have any written contract with any contractor on the Hanford Project?

A. None other than the old Hanford Contract, which they were still working under and which they had terminated by letter.

Q. Well, you had no written contract with a single contractor on Hanford Project after January 1, 1956, except the A.G.C. agreements, isn't that true?

A. Didn't have that. I never considered it applied to Hanford.

Q. I understand that.

A. If I had, there wouldn't have been any dispute.

Q. I understand that you never considered it. You were told by Mr. Knack on the morning of January 5th that, as far as the Morrisson-Knudsen Company was concerned, it considered it had a contract with you and with the Teamsters which was effective, isn't that true?

A. In areas outside of the Hanford Project, yes.

Q. No, speaking about Hanford Project only. You weren't discussing anything else at this meeting on the 5th of January except Hanford, were you?

A. I don't remember whether he stated that to me or not. If [880] he did, I can be sure of one thing, I didn't answer in the affirmative that we did have.

Q. Well, as a matter of fact, your answer was this, wasn't it, that you thought you'd better take

(Testimony of Arthur A. Rossman.)

legal counsel as to whether the agreement was effective or not? That was your answer on the morning of January 5th?

A. I don't believe so at that time. That was at a subsequent meeting up in the grand jury room of this building.

Q. Well, you have made that statement on many occasions, have you not, Mr. Rossman?

A. What statement?

Q. That you wished to have legal advice as to whether the A.G.C. contract was effective on the Hanford Project?

A. Yes, and I got it from two different sources.

Q. Yes. I would like to have a statement from you now, Mr. Rossman, as to just on what basis you contend the A.G.C. agreement was not the agreement under which your members were being paid the increase in wages? Was it because of the agreement which you have stated Mr. Knack made in this meeting on January 5th, or was it because of some statement made in the letter by Mr. McCaffree sent on December 29, 1955?

Mr. Etter: There are about three questions [881] there. He asked Mr. Rossman first to make a statement——

Mr. DeGarmo: No——

Mr. Etter: ——then he said he wanted him to answer specifically this one and then specifically another one. Now, I don't know how he could answer all three at once.

(Testimony of Arthur A. Rossman.)

Mr. DeGarmo: If I asked three questions, I will rephrase it.

Mr. Etter: You asked him to make a statement on why he believed——

The Court: I think he is asking whether he claims it is on one or the other.

Mr. DeGarmo: I want to know—I have been trying to find out ever since this trial started—what is their theory.

Q. Are you relying on the statements made by Mr. McCaffree in his letter of December 29th, which terminated the Hanford Works Agreement, or are you relying on the statement which you say Mr. Knack made in the January 5th meeting?

A. Neither one of them.

Q. Neither one of them? A. No.

Q. All right, then, I get back to my first question. What are you relying on? [882]

A. I am relying on statements made by members of the A.G.C. labor committee during negotiations that we weren't talking about Hanford when we were talking about an area agreement.

Q. Thank you. Now we understand each other.

A. I could have told you that the first morning we were here.

* * *

Q. (By Mr. DeGarmo): Mr. Rossman, under what agreement, written agreement, were health and welfare benefits paid by Morrison-Knudsen Company upon the members of your union employed by it on the Hanford Works Project subsequent to the re-

(Testimony of Arthur A. Rossman.)

sumption of work after the work stoppage and until the completion of the work on its project?

Mr. Etter: It seems to me that is [883] repetitive. He has asked Mr. Rossman to see if he can find it. Now, he hasn't left the stand since he asked him to find out about it, so I don't think he can find out any better——

Mr. DeGarmo: It is not repetitive. I asked him previously, restricted it to the period January 1 to March 22nd; I am now asking him as to what agreement it was paid under after they went back to work. It is an entirely different question.

The Court: Oh, I see.

Mr. Etter: All right.

A. Trust instrument. Once an employer makes a contribution, he is obligated to continue to make monthly contributions to the trust fund.

Q. (By Mr. DeGarmo): Do you know of any trust instrument to which Morrison-Knudsen Company is a signer?

A. I don't know whether they are a signer or not, but they have certainly participated in it.

Q. Well, they have made payments, admittedly, yes. A. Yes.

Q. But do you know of any agreement between the Morrison-Knudsen Company and your union providing for such payments other than the A.G.C. agreement, Exhibit 3?

A. No, I don't. As I said, I might check my files and see if there is one there subsequent to July

(Testimony of Arthur A. Rossman.)

1st, 1954, which was the effective date of health and welfare [884] contributions.

Q. Yes. If you will do that, please. If you don't find such an agreement, do you know of any other?

A. No.

Q. Mr. Rossman, I will try and cover this fairly quickly. You attended meetings on the 8th of March, the 10th of March, the 16th of March, and the 21st of March, did you not, with representatives of the Associated General Contractors, Spokane, Heavy Building Chapter?

A. I believe those are the correct dates.

Q. Pardon?

A. I believe those are the correct dates.

Q. Is it a fact that in the meeting of March 8th, which was held with the Pasco-Kennewick Building Trades Council, at which you were present, the statement was made that the A.G.C. agreements were considered as effective on the Hanford Works to A.E.C. work, and that the furnishing of bus transportation and of isolation pay would cease on the 12th of March?

A. Yes, the statement or the threat was made that they were going to remove the isolation pay and the busses.

Q. And as a result of that statement, a meeting was held on March 10th, was it not, at which there were further negotiations?

A. I believe that was in Spokane. [885]

Q. Yes, sir. A. Yes.

Q. And it was at that meeting that the A.G.C.

(Testimony of Arthur A. Rossman.)

Heavy Chapter made the proposal which has been referred to here and identified as Plaintiff's Exhibit—I think Defendants' Exhibit 7? It was at the meeting of March 10th? A. Yes.

Q. And is it a fact, Mr. Rossman, at that meeting the question was asked you as to whether you were willing then to sign it, and you stated you would have to refer it to your membership?

A. That is normal procedure, yes.

Q. And is it also true that at that meeting it was agreed that, in order to give you an opportunity to submit it to your membership, the discontinuance of bus transportation and isolation pay would be postponed from the 12th of March until the 19th of March?

A. Well, that was done. I don't know at whose suggestion or—as I recall it, the time element wouldn't permit me to get an answer in the original time allotted.

Q. Well, you stated that you had a meeting coming on the 14th, did you not; that you wouldn't be able to submit it before the 14th?

A. I think so.

Q. And the time was extended until the 19th, you do remember [886] that, which would be the Monday following?

A. The 19th was on a Monday, was it?

Q. Yes.

A. I don't have the calendar here.

Q. Well, that is the reason I put it in this morn-

(Testimony of Arthur A. Rossman.)

ing, because I thought we might have a question as to dates.

A. I will take your word for it that Monday was the 19th.

Q. Rather small type. If your bifocals are good, you can read it.

A. They are trifocals. March 19th was Monday.

Q. Now, is it a fact, Mr. Rossman, that a subsequent meeting was held on the 16th of March, which was following the meeting at which you stated you would refer the matter to your membership on the 14th, at which you were present?

A. March the 16th would be Friday. I don't recall unless—can you tell me where that meeting was held?

Q. It was held in the Federal Building here in Spokane at the request of the Federal Mediation and Conciliation Service.

A. Yes, I attended that.

Q. And do you recall at that meeting the question was asked as to whether your membership had voted favorably or unfavorably on the proposal which you have in front of you as Defendants' Exhibit 7, to which you replied in [887] the negative?

A. I think that's right.

Q. Was there at that meeting, Mr. Rossman, an offer made by the Associated General Contractors, both chapters, Heavy Highway and Building through Mr. Sather and the Building Chapter through Mr. Helvey, to submit the then disputes to

(Testimony of Arthur A. Rossman.)

the grievance procedure under the Operating Engineers contract, Exhibit 3, the A.G.C. contract?

A. Yes, the offer was made.

Q. And isn't it true that in answer to that, you stated that you were not willing to do that until you first received legal advice as to whether that agreement was binding on the Hanford Project?

A. That's right. Had I agreed to it, I would have been admitting that the agreement was effective, wouldn't I?

Q. Yes, you were not willing to do it because you weren't willing to admit the agreement was effective?

A. That's right.

Q. You wanted to find out first whether some attorney would tell you it was or was not?

A. I am still not willing to agree to that.

Q. And subsequent to that meeting, you took advice of Mr. Etter, who is here as your counsel in this case, did you not?

A. And another attorney, a very prominent one in Spokane, [888] who doesn't happen to be a labor attorney but a corporation counsel.

Q. And at a meeting held on the 21st of March, did you announce your decision to the panel or to the members present who included the two A.G.C. chapters?

A. I believe I rejected arbitration under the terms of the area agreements.

Q. Was not arbitration and grievance procedure also provided under the Hanford Works Agreement, Mr. Rossman?

(Testimony of Arthur A. Rossman.)

A. In different language.

Q. But it was there?

A. I don't believe arbitration was a part of the grievance procedure on the Hanford Contract, as I recall it.

Q. Well, you were insisting that all the terms and provisions of the Hanford Agreement were in effect. Were you also recognizing the grievance and arbitration procedures, if such there be, under the Hanford Works Agreement, or did you just want the good part and leave the bad out?

A. I repeatedly stated that I couldn't agree to any settlement that would provide for a cut in take-home pay for my members employed on that project.

Q. You made that statement repeatedly, didn't you? A. Many times.

Q. That regardless of what the contract said, you weren't going to take any cut in pay? [889]

A. That's right.

Q. That was the ultimate——

A. And, furthermore, during all these disputes and meetings, I never once asked for any increase of anything on the project other than the area rates, which had been customary in that contract for many years.

Q. Well, the rates were specified in the A.G.C. agreement, weren't they, for '56, '57 and '58, were spelled out—— A. Yes.

Q. ——for three years? A. Yes.

Q. Were those the rates you wanted?

A. Yes.

(Testimony of Arthur A. Rossman.)

Q. But you weren't willing to take them under the agreement, you wanted them some other way, your way?

A. My way and the way of some 160 other contractors in the area.

Mr. DeGarmo: I have no further questions.

The Court: Any redirect examination?

Mr. Etter: No.

The Court: Very well, that will be all, Mr. Rossman. Court will take a recess.

(Witness excused.)

(Short recess.) [890]

* * *

ROBERT M. LEWIS

called and sworn as a witness on behalf of the defendants, was examined and testified as follows:

Direct Examination

By Mr. Etter:

Q. Will you state your name, please?

A. Robert M. Lewis.

Q. And what is your present occupation, Bob?

A. Secretary-Treasurer of Teamsters Local 839.

Q. And for how long have you been secretary-treasurer of that local?

A. Approximately one year.

Q. One year. And that would indicate, would it, from shortly after the decease of Mr. Sewell Davis, who occupied that position prior to the time that

(Testimony of Robert M. Lewis.)

you took it over? A. Correct.

Q. And prior to the time that you assumed that position in about May of last year, 1956, were you a member of the Teamsters Local 839? [892]

A. Yes, sir.

Q. And for how long had you been a member of that Local? A. Eight, nine years.

Q. For eight or nine years? A. Uh-huh.

Q. Did you have any other position, such as trustee or otherwise, in the Local up until the time that you succeeded Mr. Davis?

A. I was chief steward of the local for several years, and the first Monday of March in 1956, I assumed the responsibility of business agent for Local 839.

Q. The first of March of 1956?

A. The first Monday in March. I believe it was the 4th.

Q. Would you tell me, Mr. Lewis, whether or not you participated in any of the negotiations in 1955 with the Hanford Contractors Negotiating Committee? A. In 1955?

Q. Yes. A. No, sir.

Q. And did you participate in any of the discussions with the Hanford Contractors Negotiating Committee in 1956? A. One meeting, sir.

Q. One meeting. Do you recall when that was, Bob? A. March the 8th.

Q. March the 8th. And at that time, as has been testified, [893] the bargaining rights, whatever they may have been, of the Hanford Contractors Nego-

(Testimony of Robert M. Lewis.)

tiating Committee were assigned, were they not, supposedly, to the A.G.C. local chapter?

A. At the conclusion of the meeting, yes.

Q. You were so advised?

A. You were so advised at the time after a caucus. We had been in discussion on a proposal that had been presented to us prior to a caucus, came back in, and they advised us they were turning over the bargaining rights to A.G.C.

Q. Now, do you recall that on or about March the 2nd your local received a proposal from the Hanford contractors Negotiating Committee?

A. (No response.)

The Clerk: Defendants' 15.

Q. (By Mr. Etter): First, without disclosing any of the contents, I will ask you to examine this and tell me if you recognize it? It is the Defendants' Exhibit 15 for identification.

A. Yes, I am familiar with this document.

Q. Did you receive a proposal then on March the 2nd of 1956?

A. The first time I saw it would have been the 4th or 5th [894] of March.

Q. The 4th or 5th of March? A. Uh-huh.

Q. This was in the official files, however?

A. Yes, sir.

Q. And you are acquainted, are you, with Mr. McCaffree's signature?

A. I have seen it several times.

Q. You have. All right.

Mr. Etter: Move at this time, your Honor, that

(Testimony of Robert M. Lewis.)

Exhibit 15 for identification be admitted in evidence.

Mr. DeGarmo: I wish to show the objection to it upon all of the grounds which have been stated with respect to Exhibits 12 and 13. There has been no showing whatever that anyone connected with this particular document had any connection with or authority to represent the plaintiff in this action or to make any proposal in its behalf and is contrary to the terms of a written agreement which exists between the parties.

The Court: The record will show the objection. It will be admitted. 15?

The Clerk: 15.

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit No. 15.) [895]

Q. (By Mr. Etter): Oh, by the way, do you know, and can you tell me if you know, whether or not your local acted on this proposal?

A. My understanding is that they did act on it and the scale was put into effect.

Q. This scale was put into effect.

The Clerk: I have marked the Defendants' 16, your Honor.

Mr. Etter: Now, Mr. DeGarmo, this is just an original of the letter which you have attached on your requests for admissions and I want to put it in as an exhibit so we can refer to it as an exhibit and not constantly have to refer to the attachment to the request for admissions.

(Testimony of Robert M. Lewis.)

Q. And this is a letter which your Local received and which was in your files from Mr. McCaffree?

The Court: Is that the cancellation letter?

Mr. Etter: That's right, your Honor, and I want to put it in as an exhibit.

The Court: No objection, I assume?

Mr. DeGarmo: None whatever.

The Court: It will be admitted.

The Clerk: That is 16, your Honor.

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit [896] No. 16.)

Q. (By Mr. Etter): Now, did you have an opportunity or were you in the Hanford Works Area, in the area where Morrison-Knudsen was working on this contract, in December of 1955?

A. Yes, sir.

Q. Do you know whether or not of your own knowledge there were Teamsters, members of Local 839, that were working on that project?

A. Yes, there were.

Q. And did you see them there?

A. Yes, I did, sir.

Q. And can you tell me, too, whether you were on that project personally in January of 1956?

A. I was.

Q. And having to do with the excavation work pursuant to the A.E.C. contract that Morrison-Knudsen was working on there?

A. I witnessed some of the work, yes, sir.

(Testimony of Robert M. Lewis.)

Q. In 1956? A. Yes, sir.

Q. Members and Teamsters of your Local?

A. Correct.

Mr. Etter: That is all. [897]

Cross-Examination

By Mr. DeGarmo:

Q. Mr. Lewis, you stated, in response to a question from counsel, that it was your understanding that the union accepted the proposal as set out in Defendants' Exhibit 15. Were you present at the meeting yourself or were you just stating something that had come to you from someone else?

A. It was several meetings about the Hanford situation and it was agreed on by the membership present at one meeting that I was in attendance at that we would agree to accept the wage scales as proposed and continue negotiating for the isolation pay and travel.

Q. Now, you were at that time, were you not, Mr. Lewis, and I am referring to the date of this document, March 2nd, 1956, dealing exclusively with the Hanford Contractors Negotiating Committee?

A. To my knowledge, yes. I was only business representative.

Q. Were you familiar in March of 1956, Mr. Lewis, with the document which I am handing you as Plaintiff's Exhibit 2, being the contract between the Associated General Contractors on behalf of its members and the Teamsters Union? [898]

A. Well, not as familiar as I am now, sir.

(Testimony of Robert M. Lewis.)

Q. Well, I would like to ask you, in view of your present familiarity, perhaps, whether, the wage scales which are set out in the letter. Defendants' Exhibit 15, for the various members of the Teamsters craft are the same wage scales which were negotiated and which are set forth in the agreement, Plaintiff's Exhibit 2?

A. Do you have reference for the same period of time, sir?

Q. I am talking about the year 1956, as of March 2nd, 1956.

A. Without comparing all of them, they appear to be the same.

Q. I am calling your attention specifically to Article 10, Schedule A of Plaintiff's Exhibit 2——

A. Uh-huh.

Q. ——which sets out the scales which were made a part of the contract, and these wages scales that are referred to in Article 10, Schedule A, as I understand it, at least from your cursory examination on that, appear to be the same as those which are set forth in this letter of March 2nd which Mr. McCaffree sent? A. Correct.

Q. So that as far as the Morrison-Knudsen Company was concerned, assuming, and I am not asking you to bind anybody, but assuming that Morrison-Knudsen Company and the Teamsters had an agreement, Plaintiff's Exhibit 2, [899] they did nothing other than to follow the agreement which is Plaintiff's Exhibit 2 when they put into effect the wage scales which are set out on Defendants' Exhibit 15?

(Testimony of Robert M. Lewis.)

A. Only the extent of the agreement that covers the rate per hour, to my knowledge.

Q. Well, there is nothing in this except as it relates to rates and classifications?

A. I believe in the letter they make reference to being subject to further negotiation, sir.

Q. Yes, but there is nothing in this letter, Defendants' Exhibit 15, about bus transportation or isolation pay or any other matters which were an area of dispute?

A. I believe not, Mr. DeGarmo.

Q. You have stated that you became business agent for the Teamsters Union on the first Monday in March, I believe you said, of 1956. Now, are you positive that you attended just one meeting with the Associated General Contractors' representatives after that date?

A. For how long a period of time?

Q. Well, from March 1st until March 22nd, inclusive?

A. In the A.G.C., I only attended one meeting.

Q. Well, that was as I understood it, and you stated that that meeting was on March 8th?

A. I believe the question, sir, was in regards to the [900] meetings that was held with the Hanford Contractors, and I stated I attended one meeting on March the 8th.

Q. Oh, that was the Hanford Contractors?

A. That is correct.

Q. And that was the meeting of March 8th?

A. Yes, sir.

(Testimony of Robert M. Lewis.)

Q. Now, did you attend the meeting on March 10th with the Associated General Contractors here in Spokane?

A. I attended the meeting on March the 10th in Spokane for representatives of several of the contractors at Hanford, as well as some of the representatives from the Associated General Contractors was present, along with some representatives, I believe, from the Atomic Energy Commission.

Q. Yes. Mr. Sewell Davis was also in attendance at that meeting, was he not? A. Yes, sir.

Q. Do you recall at the meeting which was held on March 8th, which you stated was the Hanford Contractors Negotiating Committee meeting, that in addition to the statement that the bargaining rights had been assigned to the Associated General Contractors, the statement was further made that, effective March 12th, the A.G.C. agreements would be considered as effective on all work at the Hanford Project? [901]

A. Not in those exact words, sir.

Q. Can you tell me what the exact words were, if you remember?

A. When we went into the meeting, we had a proposal from the Hanford Contractors Committee. As I recall, one of the conditions of the proposal was that the A.G.C. agreement would apply on the 12th. That was one of the propositions that they made to us and, after discussion and their proposal was turned down, why, as I mentioned earlier in the earlier testimony, we had a caucus at their request—

(Testimony of Robert M. Lewis.)

speaking of "they," I am talking about the Hanford Committee—we came back in after the caucus and they so advised Mr. Davis, Ernie Roberts was also present from the Teamsters, and myself, of the fact that they were turning over their bargaining rights to the A.G.C.

I do not recall them stating that on Monday, the 12th, that they was going to take the busses off, no.

Q. Was the matter of isolation pay mentioned?

A. Well, it was mentioned all afternoon, but now as to whether or not they stated that they was going to stop paying isolation pay on Monday, I don't remember, sir.

Q. Are you familiar with the fact, Mr. Lewis, that the furnishing of bus transportation has never been a [902] contractual obligation at the Hanford Project?

A. You are speaking as far as construction is concerned?

Q. Yes, sir.

A. I have been told that it never has. I don't know personally, no.

Q. You have never personally examined any of the contracts?

A. I have looked at some of them, but I haven't looked at those details, because a lot of times you have addendums to your agreement that doesn't appear in the body, and I worked on the project in early construction and it was furnished at that time. Under what agreement it was furnished under, **I don't** know.

(Testimony of Robert M. Lewis.)

Q. I see. Mr. Lewis, by the way, is this Local 839 under trusteeship of either the Joint Council or the Western Conference?

Mr. Carey: I didn't understand that question. Will you read it, please?

Mr. DeGarmo: I asked if the Local 839 was under trusteeship of either the Joint Council or the Western Conference at the time that these negotiations were being carried on.

Mr. Carey: It is immaterial.

Mr. Etter: Of course, I would object to it as being immaterial. I don't know what relationship it bears to any issue. [903]

Mr. Carey: Whether it is under trusteeship or not, it is still the Joint Council—or it is still the Local.

The Court: Yes.

Mr. Carey: Not the Joint Council or the Western Conference.

Mr. DeGarmo: I appreciate that, but it makes a difference in the capacity in which this man is acting.

The Court: Well, I will overrule the objection.

Q. (By Mr. DeGarmo): Can you answer the question? A. As to whether or not——

Q. I am talking about the period now, let's say, from October of 1955, until March 22nd of 1956.

A. As to whether or not it was under trusteeship of the Joint Council or Western Conference?

Q. Yes.

A. The answer to that would be no.

(Testimony of Robert M. Lewis.)

Q. Well, is it under trusteeship?

A. Yes.

Q. Well, whose trusteeship?

A. If I understand it correctly, why, it would be under International's trusteeship.

Q. Then, were you elected by the membership, or were you elected as secretary-treasurer—I think you said you were chief steward and then you were secretary-treasurer— [904] were you elected by the membership or were you selected by some organization?

A. As secretary-treasurer I was appointed to fill a vacancy.

Q. By whom? A. John Sweeney.

Q. And who is Mr. John Sweeney?

A. At that time, he was a representative. I don't know the exact title. He is deceased at the present time and I don't know how far up the ladder his authority reached, but he was the one that appointed me and at that time he was serving in some capacity of the Western Conference, but I don't know on whose authority that he acted.

Q. Well, how about when you were selected as business agent, was that by the membership or was that also by some other organization?

A. That was by appointment.

Q. And who appointed you to that position?

A. Mr. Sewell Davis, with the concurrence of the executive board.

Q. It was not by election, in any event?

(Testimony of Robert M. Lewis.)

A. No, sir.

Q. Did you replace Mr. Davis, or what was Mr. Davis' position and what was your position? That is what I am [905] trying to get straight.

A. What period of time?

Q. Well, on the first Monday in March, 1956, let's fix that as an exact day.

A. As I stated earlier, I was business representative on that day and he was secretary-treasurer on that day. I succeeded him as secretary-treasurer in the latter part of May or the first week in June. I don't know when the final payment came through.

Q. And did Mr. Davis remain merely as secretary-treasurer until the time of his death?

A. Yes, sir.

Q. And you were business agent or representative? A. Right.

Q. All right. Now, as business agent of the Teamsters Local 839, will you state under what written agreement, if any, with Morrison-Knudsen Company the members of Local Union 839 were working for Morrison-Knudsen Company on the Hanford Project between the dates of January 1st, 1956, and March 22nd, 1956?

A. Well, sir, I couldn't answer that question. Coming into the job in the first Monday in March, all this breaking so suddenly, a lot of that that I wasn't familiar with at that time and I am still not familiar with. [906]

Q. Well, you mean as business agent, you still

(Testimony of Robert M. Lewis.)

don't know under what agreement, if any, they were working at that time?

A. I wouldn't know what agreement might have been reached between Mr. Davis and other parties.

Q. I am asking about written agreements now.

A. I have not seen any, no, sir.

Q. Well, as business agent would you have access to such agreements if there were any?

A. Yes, sir, normally.

Q. And have you looked to see if you could find any written agreement between Morrison-Knudsen Company and Teamsters Local 839 other than the Plaintiff's Exhibit 2, which you had before you previously?

A. Well, I have found old agreements between Morrison-Knudsen and the Teamsters Local to that area.

Q. I am talking about the period January 1st, 1956, to March 22nd?

A. I have never seen any, no, sir.

Q. And what about the period from the date of resumption of work after the work stoppage on or about June 5th, 1956, until the Morrison-Knudsen Company completed its work on the Hanford Works Project, under what agreement was the Morrison-Knudsen Company, written agreement between Morrison-Knudsen Company, and the Teamsters [907] Local 839 was there, to your knowledge?

A. The only agreement that I know of was working under status quo conditions, which was agreed to by both sides, I believe.

(Testimony of Robert M. Lewis.)

Q. Was that a written agreement?

A. I don't know the communications that was held in regards to the panel on it. It was agreeable to both sides of the dispute that we would work status quo, and we are still working that way.

Q. And do you know of any agreement other than this so-called status quo than the Plaintiff's Exhibit 2?

A. I believe that I answered you, sir, that I had not seen any.

Q. Were you aware, Mr. Lewis, of the penalty provisions of the Taft-Hartley Act to which I referred in cross-examination of Mr. Rossman concerning the acceptance of health and welfare payments by a union or its representative from an employer in the absence of a written agreement specifying the details of the payment?

A. No, not as such, no, I didn't. We don't accept them, I mean the payments do not come in to our Local, and it is handled by a trust fund and I am not familiar with all the details.

Q. Well, that is a trust fund upon which your organization has representatives, is it not? [908]

A. That is correct, I believe it is an equal number with the contractors and the union, I believe, sir.

Mr. DeGarmo: I have no further questions.

Mr. Etter: That is all. Call Mr. Clary.

(Witness excused.)

HAROLD EDWARD CLARY

called and sworn as a witness on behalf of the defendants, was examined and testified as follows:

Direct Examination

By Mr. Etter:

Q. Will you state your name, please?

A. Harold Edward Clary.

Q. Where do you live, Mr. Clary?

A. I live in Benton City, Washington.

Q. Benton City, Washington. Is that close to Richland, Kennewick and Pasco?

A. About a half hour's driving distance.

Q. I see. And how long have you lived at Benton City, Mr. Clary?

A. Off and on since 1947.

Q. Off and on since 1947. Have you lived in that general area since that time?

A. I have lived in that general area since 1944.

Q. Since 1944? [909] A. Uh-huh.

Q. What is your present official capacity, if you have one? A. I am at present unattached.

Q. You are unattached. And what has been your occupation or trade?

A. My business has been business representative. I have since March 15, 1948. Prior to that, president of Painters Local Union 427 from February 25th, 1954.

Q. Until what date?

A. Until December 7th, 1956.

Q. Until December 7th of 1956?

A. Uh-huh.

(Testimony of Harold Edward Clary.)

Q. Is that correct? A. Yes, sir.

Q. And that Local comprises men in the painting craft from what area, will you tell me?

A. Local Union 427 comprises painters, tapers, linoleum layers and glaziers.

Q. And from what area?

A. Our jurisdiction comprises the entire Benton County.

Q. All of Benton County? A. Uh-huh.

Q. Was your organization in 1956, on January the 1st, affiliated with the Building Trades Council of Pasco [910] and Kennewick? A. We were.

Q. Were you on January the 5th of 1956?

A. We were.

Q. Were you in attendance at a meeting at the Labor Hall at Pasco, Washington, on the afternoon of January the 5th, 1956? A. I was.

Q. And how did you happen to be there?

A. We were advised that the Morrison-Knudsen people were meeting with the executive board members of the building trades for a pre-job conference so that we could continue the cordial relationship that we anticipated would exist throughout their job.

Q. And do you know how many representatives were there from unions?

A. My estimate would have to concur with the testimony which has already been given, possibly 14 or 15 men.

Q. And you remember that Mr. Knack was there? A. I do.

(Testimony of Harold Edward Clary.)

Q. And Mr. Reed? A. I do.

Q. Now can you tell us just briefly what the discussion was at the time, what the conference concerned?

A. Well, the conference concerned the existing conditions [911] at the Hanford Works, the numbers of men that they contemplated using, and the approximate scheduling of the hiring of the men.

Q. I see. And do you recall that there was any conversation at that time that had to do with the existing conditions on the Hanford Works Project as they related to conditions and pay?

A. Toward the completion of the meeting or the adjournment of the meeting, Mr. Knapp and Mr. Knack conferred relative to the conditions that they bid the job, and so forth, and I believe the conversation ensued and Mr. Knack stated that he wasn't interested in local politics, they were there to do a job, had bid it to do it, and were there to carry out the assignment to the best of their ability.

Q. Was anything said with regard to isolation pay and bus transportation?

A. That was the gist of the conversation at the adjournment of the meeting.

Q. Well, do you recall what was said about it? If you can, I wish you would tell us in substance what Mr. Knapp might have said to Mr. Knack and what he said in return, if anything, and so forth.

A. That they weren't desirous of upsetting anything or establishing any precedent. [912]

Q. Who said that? A. Mr. Knack.

(Testimony of Harold Edward Clary.)

Q. And was there any further conversation that you heard, about it?

A. There was something further, but I didn't hear the balance of the conversation.

Q. And are you referring now to a conversation that concerned the transportation and isolation pay?

A. Yes, sir.

Q. You are.

Mr. Etter: That is all.

Mr. DeGarmo: No questions.

Mr. Etter: All right. Mr. King.

(Witness excused.)

LAWRENCE R. KING

called and sworn as a witness on behalf of the defendants, was examined and testified as follows:

Direct Examination

By Mr. Etter:

Q. You are Lawrence King? A. Yes.

Q. Larry, called Larry most of the time?

A. Yes.

Q. Where do you live, Mr. King? [913]

A. In Kennewick, Washington.

Q. And with your family? A. Yes.

Q. And how long have you lived in Kennewick?

A. About five and a half years.

Q. About five and a half years? A. Yes.

Q. And what is your present trade or occupation?

(Testimony of Lawrence R. King.)

A. I am employed as a business representative and financial secretary of Millwrights and Machinery Erectors, Local Union 1699.

Q. Millwrights and what was that?

A. Machinery Erectors, Local Union 1699.

Q. And how long have you held that position, Larry? A. Five years.

Q. Five years. And were you such business agent and representative of the Millwrights Local in January, 1956? A. Yes.

Q. And were you on January 5th of 1956?

A. Yes.

Q. Did you have occasion to attend the meeting at the Labor Hall in Pasco on the afternoon of January the 5th of 1956? A. I did. [914]

Q. And can you tell me, as you recall it, who was represented or who was present, by name, if you can remember?

A. Well, there were several of the union representatives present. Other than myself, Mr. Clary, Mr. Knapp, Mr. Rossman. I remember them particularly. There was representatives of the Morrison-Knudsen Company, Mr. Lee Knack and Mr. Ray Reed. I remember them.

Q. Anybody else you can remember?

A. Well, not specifically.

Q. Mr. Dunn was chairman of the meeting?

A. Yes, Mr. Dunn was there, Mr. Brown of the Carpenters was there.

Q. I see. Now, how did you happen to be in at-

(Testimony of Lawrence R. King.)

tendance at the meeting? Can you tell us what circumstances?

A. As a member of the Building Trades, I was notified that that meeting would be held with the Morrison-Knudsen Company, which was considered a pre-job conference.

Q. I see. And your Millwrights Local is a member of and associated with the Pasco-Kennewick Building Trades Council? A. Yes, they are.

Q. And you went to the meeting pursuant to the notice or advice you had received? A. Yes.

Q. Did you have any particular interest in that pre-job [915] conference so far as Morrison-Knudsen was concerned?

A. Well, yes, we have an interest in any pre-job conference that pertains to our work, our conditions that we will be working under.

Q. I see.

A. And work we will be doing.

Q. Now, do you recall any conversation that occurred at that time with respect to the existing Hanford Agreement as it related to isolation pay and bus transportation? A. Yes.

Q. And will you tell us what was said, as you recall it?

A. Well, it was toward the later part of the meeting about to adjourn, and Mr. Knapp asked of Morrison-Knudsen Company what their position was going to be on bus transportation and isolation pay. Mr. Knack answered for the Morrison-Knudsen Company to the effect that they weren't there to

(Testimony of Lawrence R. King.)

disrupt anything that had been going on and that he would continue to pay it and furnish transportation.

Q. Did you have any particular interest in that subject at that time?

A. Yes, we were very much interested in it.

Q. I see.

Mr. Etter: That is all. [916]

Cross-Examination

By Mr. DeGarmo:

Q. Mr. King, was that the only thing that Mr. Knack said at this meeting? Have you given us all of the conversation now?

A. No, he had discussed——

Q. I mean, on this particular subject, was that the full statement that he made in answer to Mr. Knapp's question so far as you can recall?

A. That was the pertinent facts of it.

Q. Well, that wasn't the question I asked you. The question I asked you, was that all that he said as far as you can remember?

A. Well, that part of it I definitely remember, yes.

Q. Well, can you remember that he said anything else? A. No, not particularly.

Q. All right. And what you say he said was to the effect that they were not there to disrupt anything and that they were going to do what?

A. They were going to continue to pay—furnish transportation and furnish, or rather pay the isolation pay. That is what they had bid the job.

(Testimony of Lawrence R. King.)

Q. That was what?

A. That is the way they had bid the job. [917]

Q. Well, now, you didn't tell us that the first time, did you? A. No, I didn't.

Q. Well, now, do you recall anything else? I want to give you full opportunity to tell us everything that he said.

A. Not at the present, I don't.

Q. I assume that you have discussed the statement which he made at that meeting with Mr. Rossman and with Mr. Lewis and with Mr. Dunn and with Mr. Clary, is that correct?

A. I think it has been pretty much limited to discussion with Bill Dunn. He called me on the phone and asked me if I recalled the meeting and what was said, and I repeated, I wouldn't say exactly word for word, but very close to what I have just said. That was a week or two ago.

Q. Has your memory been refreshed at all by anything that has taken place in this courtroom?

A. Not on that particular meeting, I don't think so, not much more.

Q. You have sat here throughout this trial, have you not?

A. Yes—not all of it, but most of it.

Q. Well, how much of it were you not here?

A. One day, Thursday.

Q. Other than Thursday, you have been here continuously? [918] A. Yes.

Q. Now, Mr. King, I would like to have you tell us what else you can remember that Mr. Knack said

(Testimony of Lawrence R. King.)

upon any other subject at this meeting on the 5th of January, 1956.

A. Well, I couldn't give you the figures, but he did relate to us the amount of work that his company was doing in foreign countries. He talked about a job in Missouri, I believe it was, the troubles that they had there. I remember he introduced Mr. Ray Reed at that time. I think that was the first time I met him. He pointed out that Mr. Reed was the boss on that job, not to go over his head, to go to him and he would take care of it, and not to come to Mr. Knack. Those things I remember, also.

Q. Anything else? This meeting lasted about three hours, now, two hours and a half.

A. Well, there was a lot of conversations at those type of meetings that I might not have been particularly interested in, not affecting the union I represented.

Q. Well, would the matter of jurisdictional disputes have any significance to you as business agent of the Millwrights? A. Yes, it would.

Q. Did he say anything about jurisdictional disputes? [919] A. Yes, he did.

Q. What did he say?

A. Well, verbatim, I don't know what his words were, but they were hoping to have harmonious relationships.

Normally, at pre-job conferences the jurisdictional disputes are not taken up in detail, they are not settled at pre-job conferences.

Q. Well, can you remember anything else that he

(Testimony of Lawrence R. King.)

said about jurisdictional disputes at this two hour, two hour and a half, meeting?

A. Not particularly.

Q. Do you remember any other subject that was made a specific item of discussion?

A. I can't think of any right now.

Q. But you can remember that at the tail end of the meeting Mr. Knapp made a statement and that Mr. Knack gave the precise answer that you have given here?

A. Yes, in about that language, yes, I remember.

Q. Which included that they had bid the job on that basis? You are sure of that, now?

A. Yes, I am.

Q. Now, you didn't tell us that the first time, did you? A. No.

Q. But you are sure of that now?

A. Yes. [920]

Q. There is no question in your mind?

A. No.

Q. You didn't just think of that because somebody else has testified to that? A. No.

Q. All right. Well, now, as a matter of fact your union was interested in bus transportation and isolation pay, too, wasn't it?

A. That is what I said, yes, we were.

Q. And you hadn't signed any separate area agreement at that time, had you?

A. No. We were in negotiations at that time.

Q. Was Mr. Knapp speaking for you?

A. No.

(Testimony of Lawrence R. King.)

Q. Had you authorized him to speak for you at this meeting? A. No.

Q. Did you ask any question on the subject?

A. No.

Q. You didn't ask whether this statement that Mr. Knack made also covered the Millwrights?

A. No.

Q. You knew Mr. Knapp quite well at that time, did you not? A. Yes.

Q. And you know that he was the business agent for the Cement Finishers? [921]

A. Yes.

Q. Did you know anything else about him other than that, as to who he was representing at this meeting? A. No.

Mr. DeGarmo: I have no further questions.

Redirect Examination

By Mr. Etter:

Q. Did you assume that the answers that Mr. Knack made applied to the unions generally?

Mr. DeGarmo: Just a minute, if your Honor please. I object upon the ground that assumption is inadmissible.

The Court: Well, I will sustain the objection.

Mr. Etter: That is all.

(Witness excused.)

That is all of our testimony, your Honor.

Now, I made copies, your Honor, of the amendment and I have handed Mr. DeGarmo the copy of

one I read the other day, and it has been suggested, and I think a good suggestion, that I file this copy so it will be in the record. Mr. Oden may have it if he wishes.

The Court: All right.

Mr. Etter: There is one other thing, your Honor. The affirmative defense, as I gathered, was [922] stricken and this amendment was allowed, but it was not allowed along with the reinstatement of the affirmative defense, which is still stricken, I understand correctly, do I?

Mr. DeGarmo: Well, I hope you do. I thought that was the ruling.

Mr. Etter: Well, I just want to make sure.

The Court: Yes, that was my understanding.

Mr. Etter: Beg pardon?

The Court: Yes, that was my [923] understanding.

* * *

Court will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m. Tuesday, June 18, 1957.) [955]

10 o'Clock A.M.—Tuesday, June 18, 1957

(Whereupon, the trial in the instant cause was resumed pursuant to adjournment, all persons being present as before, and the following proceedings were had:) [957]

* * *

ARTHUR A. ROSSMAN

having previously been sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. DeGarmo:

Q. Mr. Rossman, during the course of your cross-examination yesterday, I asked certain questions of you relating to any written agreement between Morrison-Knudsen Company and the Operating Engineers Local No. 370 with reference to the payment of health and welfare upon employees employed at the Hanford Works Project. Have you made a search to determine whether you have any such written agreements?

A. I didn't understand your question to refer exclusively to the Hanford Project. I understood——

Q. Well, do you have any agreements that would cover employees working at the Hanford Project, written [958] agreements?

A. I have four, four agreements, signed by representatives of Morrison-Knudsen, providing for health and welfare within the territory of this agreement, none specifically pinning down Hanford.

Q. When you refer to this agreement, you refer to Exhibit 3, plaintiff's Exhibit 3, the A.G.C. agreement?

A. Two of them tie into that, yes. No, not Exhibit 3, the prior agreement, prior to the 1956 agreement.

(Testimony of Arthur A. Rossman.)

Q. Yes. Well, before I ask you about those agreements, is it your position that the agreements which you have provide for health and welfare payments upon employees at the Hanford Project?

A. The Exhibit 3 that is here——

Q. No, the question is whether the agreements which you have produced are agreements which you contend provide for health and welfare payments upon employees of Morrison-Knudsen who were employed at the Hanford Project under the contract, Exhibit 1? A. Yes.

Q. All right. Now, will you produce those agreements that you say——

A. If a contractor has two or three jobs in an area under our jurisdiction and contributes health and welfare and agrees to on one contract, I assume that he does on all [959] of them. Let me answer it that way, we wouldn't exclude one specific job.

Q. Well, let's see the agreements that you are referring to and perhaps they will give us the answer to the question that I am asking.

A. This first one is the Morrison-Knudsen sponsored contract, Columbia River Constructors, on the Chief Joseph Dam.

Q. Is it signed by Morrison-Knudsen Company?

A. By their representative, George Piedmont.

Q. Well, is it signed by each of the members of the joint venture or by the joint venture?

A. By each of the members—no, by just George Piedmont.

(Testimony of Arthur A. Rossman.)

Q. Let me see the agreement that you are referring to. A. (Witness complies.)

Q. Well, the agreement that you are showing me—I don't wish to take papers from your fist, although I may have to—the agreement which you are showing me, Mr. Rossman, is one that is signed by Columbia River Constructors, George Piedmont, isn't it? A. That's right.

Q. There is nothing there that states that it is Morrison-Knudsen Company?

A. No; however, Morrison-Knudsen was the sponsoring contractor of that joint venture. [960]

Q. Well, do you know who the joint venturers were who were Columbia River Constructors?

A. Yes, I believe there were ten of them.

Q. Yes, and Mr. Piedmont just happened to be one of the members of the joint venture?

A. He was an M-K man, as was all supervision on that project.

Q. But this was not Morrison-Knudsen Company which has signed this agreement, is it?

A. Not in the strict sense, no.

Q. No. And that related to Chief Joseph Dam power house, did it not? A. Right.

Q. And it didn't relate to Hanford Works at all; the Columbia River Constructors did not have any work at Hanford Works? A. No.

Q. All right. Now, let's see if you have any other contracts that are signed by Morrison-Knudsen Company relating to Hanford Works?

A. Here is one that covers a Morrison-Knudsen

(Testimony of Arthur A. Rossman.)

shop at Yardley, Washington, which provides for health and welfare contributions, and those men, while they are primarily employed in the shop, they go out on jobs and it is conceivable that some of them may have gone [961] to Hanford.

Q. Well, was this particular project that this agreement was written on for work within the Hanford Works Project?

A. Not specifically, no.

Q. Well, specifically, it wasn't, isn't that true? It was on a particular job?

A. Well——

Q. May I see the agreement?

A. Yes. I would like to read you one clause:

“It is mutually agreed that when men employed in this shop are required to transfer their activities to the site of construction jobs for their employer, their wages and working conditions shall be governed by the Highway and Heavy Construction Agreements effective in the area at the time.”

And they do that frequently, go out of the shop.

Q. Is it your position now that the A.G.C agreement, Exhibit 3, was the agreement in force and effect at Hanford Works, Mr. Rossman?

A. No.

Q. Well, then, what relevancy does the language that you read to me have to the issue that is now before the Court? [962]

A. This is not an A.G.C. agreement either, that is strictly a Morrison-Knudsen agreement.

Q. I know, the shop agreement that you are referring to.

A. That's right.

(Testimony of Arthur A. Rossman.)

Q. It says they shall be covered by the Highway and Heavy Construction Agreement in effect in the area at the time. Now, the only Heavy and Highway Construction Agreement is an A.G.C. agreement, isn't it?

A. With the exception of Hanford.

Q. Yes, with the exception of Hanford.

A. Yes.

Q. Hanford Works Agreement? A. Yes.

Q. This agreement states that it covers the employment of members of the union employed in the repair, maintenance, welding, and servicing of construction equipment owned by or under lease to the employer in the employer's shop at Yardley, Washington.

Now, you don't contend, do you, Mr. Rossman, that that is an agreement which covered the employees of Morrison-Knudsen Company at Hanford Works, do you?

A. Not unless they went down there, some of them went down there to repair equipment on the job, which they do occasionally.

The Court: Where is Yardley? [963]

A. Just out of Spokane in the Spokane Valley.

The Court: Near Spokane? A. Yes.

Q. (By Mr. DeGarmo): Do you have any other agreements that you want to tell us about now that you contend cover employees of Morrison-Knudsen Company on the Hanford Works Project?

A. As I recall your questioning yesterday, you asked me if there were any contracts covering Han-

(Testimony of Arthur A. Rossman.)

ford, and I said no, and you asked me if there were any other contracts providing for health and welfare signed by Morrison-Knudsen, and I said I didn't know and I would check, and that is why I brought these.

Q. Well, I think, Mr. Rossman, you may have misunderstood me. I believe the record is clear that I was asking you specifically about the Hanford Works.

A. I think I answered "no" to that question.

Q. Yes, and you still say "no" to that question?

A. That's right.

Q. Without reading from them, neither of these last two documents that you have handed me purport to cover Hanford Works?

A. One of them is Box Canyon Dam and the other one is the Morrison-Knudsen job at Mesa, which is right adjacent to the Hanford [964] Project.

Q. Yes.

Mr. DeGarmo: I have no further questions.

Redirect Examination

(Continued)

By Mr. Etter:

Q. Well, is it the fact or is it not, Mr. Rossman, that health and welfare contributions are required everywhere in the area from all contractors regardless of an existing A.G.C. agreement?

A. That's right. We don't furnish men to an em-

(Testimony of Arthur A. Rossman.)

ployer unless he contributes to the health and welfare fund.

Q. And health and welfare, the commencement of payments to employees in the Hanford Project started in 1954, did it not?

A. That's right.

Q. And it has continued from 1954 through 1955 and up until the present?

A. They are still being paid.

Q. And even though at that time and at the time of the payment of health and welfare on the project, the contractors were providing bus transportation and isolation pay at the same time?

A. That's right, continuously before 1954 in those two instances and beginning July 1st, 1954, in the case of the health and welfare. [965]

Mr. Etter: Yes, that is all.

Mr. DeGarmo: That isn't all?

Mr. Etter: Well, one minute more.

Mr. DeGarmo: Yes.

Q. (By Mr. Etter): Is it or is it not the fact that there are many other contractors, independent and otherwise, who are not members of A.G.C. or signatory who also pay health and welfare on work performed within this area? A. Yes.

Mr. DeGarmo: Just a minute, Mr. Rossman.

The Court: Just a moment.

The Witness: Sorry.

Mr. DeGarmo: I object to the question on the ground that it is leading. Counsel has asked about half a dozen now that have great conclusions in

(Testimony of Arthur A. Rossman.)

them and from which Mr. Rossman could say "Yes." I think Mr. Rossman should be permitted to testify as to what he knows of his own knowledge.

The Court: Well, I think the last question was leading. It seems to be a common erroneous notion among lawyers that an attorney may lead on re-direct, but it is always a temptation to do that.

Mr. Etter: That is all as far as I am [966] concerned.

Recross-Examination

By Mr. DeGarmo:

Q. Well, now, I have a few questions in view of the statement Mr. Etter made to which you answered "Yes."

You say that all employers on the Hanford Works Project have paid health and welfare; is that your testimony? A. Yes.

Q. Do you know why they have paid health and welfare, Mr. Rossman, under what agreement?

A. By virtue of being represented by the Hanford Contractors Negotiating Committee, who agreed to health and welfare contributions.

Q. Well, now, that was paid under the Hanford Works Agreement, was it not, Mr. Rossman?

A. Yes.

Q. Was it paid for any other reason than the Hanford Works Agreement, to your knowledge?

A. Well, the health and welfare language was taken from the A.G.C. agreement and placed in the

(Testimony of Arthur A. Rossman.)

Hanford Agreement. The wording is identical, I believe. It starts out, "In consideration of the contributions of other employers."

Q. Is it your contention, Mr. Rossman, that the Hanford [967] Works Agreement, which I am handing you as Plaintiff's Exhibit 6, is a written agreement between an employer, any employer, regardless of whether he signed that agreement or not, and the union which you represent?

A. It was negotiated for that purpose with the committee to cover all employers doing work on the Hanford Works for the Atomic Energy Commission.

Q. I appreciate that that is your position, but is it your contention that the Hanford Works Agreement, as such, without the signature of a particular employer, was a written agreement with your union?

A. Why, yes.

Q. Merely signed by Hanford Contractors Negotiating Committee, Mr. McCaffree or Mr. McReynolds, or whoever they were? I don't think Mr. McCaffree was actually a member of the committee.

A. Yes, we were assured that they represented all employers on the project, and we didn't expect all the employers to sign the contract any more than I expect three thousand of my members to sign the A.G.C. agreement. I sign for them as their representative.

Q. Who assured you that they represented all employers, Mr. Rossman?

A. The committee and Mr. Shaw.

(Testimony of Arthur A. Rossman.)

Q. Did you ever read this agreement? [968]

A. Yes.

Q. I read this to you:

“This collective bargaining agreement (hereinafter called the agreement) by and between the signatory construction contractors, representing and acting for contractors who presently or during the life of this agreement become signatory to this agreement and perform construction work * * *”

Now, did you read that preliminary paragraph, the very first paragraph in the agreement?

A. Yes.

Q. And in spite of that language, you say that you understood that all contractors were parties to this agreement, was that your understanding?

A. Yes, because no contractor ever signed it, to my knowledge, and there were hundreds of them there.

Q. We will find out about that a little later.

Now, were you aware of the fact, Mr. Rossman, that there was a provision in every contract between the Atomic Energy Commission and every prime contractor who has performed work in the Hanford Area for the Atomic Energy Commission since the formation of the Hanford Works Agreement which did not incorporate this [969] agreement into the prime contract, but which contained this language:

“The contractor agrees to pay laborers and mechanics engaged in the work hereunder at Hanford Works the scale of wages and allowances prevail-

(Testimony of Arthur A. Rossman.)

ing at Hanford Works, including all terms of any modification thereof, as determined by the Commission, provided, however, that in no case shall the contractor be required to pay less than the applicable schedule of rates pre-determined by the Secretary of Labor pursuant to the Davis-Bacon Act and attached as Section 3 of Part IV, Wage Rates and Allowances of the Specifications. Sections 1 and 2 of Part IV set forth the scale of prevailing wages and allowances determined by the Commission as of the date indicated therein. There shall be no adjustment in the contract price, nor shall the contractor be entitled to any additional compensation, in event of any increase or decrease in prevailing wages or allowances. 'Allowances' as used herein, shall be construed to mean all payments made to or for the account of laborers or mechanics other than wages. The [970] contractor shall cause appropriate provisions to be inserted in all subcontracts whereby the subcontractors will be required to conform to the following clause * * *

and that as a part of Part IV, which is referred to in the language I just read to you, there was included this language:

"Health and welfare allowances,"

and I will skip some of the sections:

"(g) Operating Engineers. Employers of members of the craft contribute seven and one-half cents per hour of work performed by each worker of this craft into a jointly administered health and security fund."

(Testimony of Arthur A. Rossman.)

Were you aware that every contract which was let subsequent to the Hanford Works Agreement had provisions such as I have read to you?

A. Yes.

Q. Well, now, that is not payment under the Hanford Works Agreement, is it; it is under the terms of the A.E.C. contract? That was the reason you received the health and welfare payments from these contractors, wasn't it?

A. I don't know how that was written in there.

Mr. DeGarmo: That is all.

Mr. Etter: That is all. [971]

The Court: That is all, Mr. Rossman, then.

Mr. Etter: Now, your Honor, I want to call Mr. Rossman as our final witness and I am going to ask him just two or three questions, and I should advise your Honor that Mr. DeGarmo will object on the ground of varying the parol contract, but I want to make this purely as one simple offer of proof from one witness and I am not trying to violate any order of the Court or anything of that kind.

The Court: Yes.

Direct Examination

(Resumed)

By Mr. Etter:

Q. Now, Mr. Rossman, you were present, were you not, or were you present at a meeting with the Associated General Contractors on or about the 3rd day of November of 1955?

A. Yes.

(Testimony of Arthur A. Rossman.)

Q. And will you tell us who was present at that meeting on behalf of the Associated General Contractors committee?

A. George Sebeck, Sam Guess, Dewey Murrow—that committee varied from time to time. Unless I refer to notes——

Q. Do you recall Mr. Winslow was there?

A. Yes, Mr. Frank Winslow was there.

Q. Mr. Sather? [972] A. Mr. Sather.

Q. Mr. Degerstrom?

A. Neal Degerstrom.

Q. All right, and who was present on behalf of the Operating Engineers?

A. Dick Hollingsworth and myself.

Q. Now, what type of a meeting was that?

A. It was one of many meetings held to negotiate the 1956, '57 and '58 A.G.C. contract.

Q. That is the contract that is in here so far as the defendant Engineers are concerned, Exhibit No. 3?

A. Yes.

Q. Will you state whether or not during that discussion there was conversation and discussion and negotiation with respect to Article II of the Exhibit No. 3 referring to territory and work covered?

Mr. DeGarmo: Just a minute——

A. Yes.

Mr. DeGarmo: Now, if your Honor please, at this point I wish to object to the testimony upon the ground that it is an attempt to go behind the

(Testimony of Arthur A. Rossman.)

ruling of the Court and to vary the terms of the contract by showing the pre-contract negotiations.

The Court: Yes, I will sustain the objection, but I see no reason why you couldn't make an offer of proof [973] as to what this witness would testify if permitted to do so.

Mr. Etter: From now on, that's right.

The Court: Yes.

Mr. Etter: I now offer to prove your Honor, in view of the objection and the Court's ruling, that if the witness were permitted to testify, he would testify as follows:

That a discussion was held at this particular meeting, referring to November 3rd, 1955, at which the named persons were present in a contract negotiation meeting between the Associated General Contractors and the defendant union Engineers No. 370, and that at that time during this discussion there was discussed Article II, Territory and Work Covered, and that the witness would testify that the group indicated that there should be a clarification about a part of Article II with reference to Idaho County, north half, and that likewise during that discussion with respect to that clarification, there was a suggestion for clarification of the relationship of the proposed contract to the Hanford Agreement, and that at that time one of the representatives of the Associated General Contractors, Mr. Dewey Murrow, stated to the Engineers and to those present that the Associated General Contractors were in no wise interested in the [974]

(Testimony of Arthur A. Rossman.)

Hanford Project and were not negotiating on any conditions for the Hanford contract because it was an old agreement to which different fringe benefits were attached.

That, likewise, at said meeting the matter of Article III, Hiring, was discussed; that likewise Section 2, Regular Hours of Work, was discussed; that Article V, Working Rules, Schedule A, was discussed, as were the following other matters, all in connection with the proposed contract to which reference is made as Exhibit 3 in this case:

(1) With respect to mucking machine oiler, trenching machine, concrete paving machine, with respect to one hour's time firing up the boiler, with regard to all repair by or under supervision, with regard to Section 5 of Article V, and I might say this, that these last that I have repeated starting with mucking machine as one and continuing through are all part of Article V and the testimony of the witness would show that discussion was centered on those one, two, three, four, five, six, and seven, and that is it.

Mr. DeGarmo: I object to the offer of proof upon those same grounds as stated to the testimony of the witness.

The Court: Very well, objection will be [975] sustained.

Mr. Etter: That is all, Mr. Rossman.

Mr. DeGarmo: I have no further questions, Mr. Rossman.

(Witness excused.)

Mr. Etter: That is our case, your Honor.

Mr. DeGarmo: At this time, if your Honor please, for the purpose of the record I wish to move that there be stricken from the evidence all testimony concerning negotiations between the Hanford Contractors Negotiating Committee and representatives of the defendant unions during the period from January 1, 1956, until March 8, 1956——

The Court: Pardon me for interrupting you, Mr. DeGarmo——

Mr. DeGarmo: Yes.

The Court: ——but I didn't get—you have no objection to Mr. Rossman answering from where he is?

Mr. DeGarmo: Surely.

The Court: ——the date of this conference, or approximate date?

Mr. DeGarmo: I think he said November 3rd.

The Court: He gave that, but I didn't get it in my notes.

Mr. Rossman: Yes, November 3rd. [976]

Mr. Etter: Yes, November 3rd, your Honor.

The Court: Yes, thank you, all right. All right, Mr. DeGarmo.

Mr. DeGarmo: During the period from January 1st until March 8th, 1956, upon the ground that there has been no evidence introduced by the defendants which would show the authority of the Hanford Contractors Negotiating Committee to act on behalf of the plaintiff in this case. I make that as one motion.

I also move to strike from the record any reference to negotiations or dealings between the Hanford Contractors Negotiating Committee and the defendant unions or members thereof in the period prior to January 1, 1956, upon the same ground, that there has been no testimony offered on the part of the defendants which would show the agency or authority of the Hanford Contractors Negotiating Committee to act on behalf of the plaintiff.

The Court: The motions will be denied. I think, as I have heretofore indicated, there is doubtless a good deal of evidence admitted here, and perhaps more will be admitted, that the Court may not ultimately find is of much value or of much materiality so far as the issues, the real issues, between the parties are concerned, and the Court, you may be assured, will [977] consider it only insofar as it is material to the issues when the case is decided, but for the record, the motions will be denied.

Mr. DeGarmo: Thank you, your Honor.

I would like to call Mr. Knack as a rebuttal witness.

The Court: Let's see, Mr. Knack was sworn?

Mr. DeGarmo: Mr. Knack has been sworn, yes.

There is one question that I would like to ask of the Court and perhaps I should ask it of counsel in order that I may determine what course the rebuttal evidence in this case should take upon one feature of this case.

Your Honor will recall that I did not move to strike one section of the affirmative defense which

had been interposed relating to the question of jurisdiction of the United States Government at Hanford Works, and by the amendment to the pleadings they have again reinserted that provision in the amended affirmative defense. I have heard no testimony or reference to testimony upon it, and in order that I may know whether I am forced to attempt to meet that, I believe that I should be advised by counsel as to whether they are still relying upon that affirmative defense.

Now, the reason I ask the question is that there [978] were some requests for admissions and there are some documents in the file in the nature of answers to requests for admissions that bear on that subject, and I don't know whether they intend to argue those and whether they are still relying on that as a defense or not. If they are, then I have some testimony that I will wish to introduce upon the subject and I don't wish to do it if they are not still relying upon it.

Mr. Etter: Well, your Honor, our position is that the status, let's say, let's put it that way, of the Hanford Works Area is indicated and shown by the requests and the answers to the requests for admissions as they appear in the record.

Mr. DeGarmo: I take it you intend to argue that, then?

Mr. Etter: Yes, that would be our position. We don't take issue——

Mr. DeGarmo: Then, we will offer——

Mr. Etter: ——with admissions that are in the record made upon request of both parties.

Mr. DeGarmo: Then, I will be forced to introduce evidence on it.

The Court: I thought that counsel now took the position that there was concurrent jurisdiction.

Mr. DeGarmo: Well, of course, there wasn't even [979] that, and I will have to show that, I guess.

Mr. Etter: Our position is this, your Honor, without disputing what Mr. DeGarmo said about concurrent or measure of concurrency and a non-measure of concurrency, that the proper situation is indicated by the declarations for admissions and that it is some kind of a hybrid organization that it would take more than me, at least, to describe.

The Court: All right. I get the impression that counsel is not pressing the point raised earlier in the lawsuit, that the Hanford Reservation is not a part of Benton County, but I gather now that counsel thinks that it may have some factual significance here, the peculiar nature of the area, in bearing upon the point that it had special treatment and was not included in some of these general contracts or in the application of the general A.G.C. contracts.

Mr. Etter: That correctly states our position.

The Court: Yes.

Mr. DeGarmo: All right, I know where to proceed, then.

LEE J. KNACK

having been previously sworn, resumed the stand in rebuttal, and testified further as follows: [980]

Direct Examination

By Mr. DeGarmo:

Q. Mr. Knack, you have already been sworn and have testified in this case. I want to direct your attention to just two particular meetings at which it has been stated attended.

I refer first to the meeting held at Richland, Washington, on the morning of January 5th, 1956. Will you state first, Mr. Knack, where that meeting was held?

A. Well, it was held in the administrative area, I presume, of the A.E.C. I have not been over there very frequently and do not know explicit locations, but it was at one of the offices of the A.E.C. area, because I remember we had to get a badge or clearance or something there in the morning to go in.

The Court: That was behind the barrier, then, not down in the town of Richland?

A. Well, I don't know, sir, what is behind the barrier and what constitutes otherwise. I am not familiar with that.

The Court: All right.

Q. (By Mr. DeGarmo): It was in one of the administration buildings, that you know, but beyond that, you don't?

A. I could say in the administration area. [981]

Q. In the administration area. All right. It was

(Testimony of Lee J. Knack.)

in the city of Richland, do you remember where it was from the hotel?

A. It was across the street. Again not being familiar with directions there, I would say it was south.

Q. Of the Desert Inn?

A. Of the Desert Inn.

The Court: That was just in the big administration building there in Richland? A. Yes.

The Court: It wouldn't be in the Area, then. Go ahead.

Q. (By Mr. DeGarmo): Can you relate for the record, Mr. Knack, your memory of who were present at this meeting?

A. Mr. Reed of Morrison-Knudsen Company was present there, Mr. Thurston of the A.E.C. was present, Mr. Ken McCaffree, Mr. Art Rossman, Mr. Knapp, Charlie Knapp, was there, Mr. Sewell Davis, and I remember there were others there, too. I remember quite distinctly that at the onset of the meeting Mr. Cochran was not present at the onset, but came in late.

Q. Now, first, Mr. Rossman I think the record will identify. Mr. Sewell Davis, who was he?

A. With the Teamsters.

Q. And Mr. Knapp is the witness who testified here in this [982] case? A. Yes.

Q. And who would be Mr. Mickey Cochran?

A. Insofar as I know, he was affiliated or some part of the L. H. Hoffman Construction Company.

(Testimony of Lee J. Knack.)

Q. Do you recall, Mr. Knack, how you came to attend this particular meeting?

A. Well, yes, I had arrived at the area and had checked in at the Richland hotel specifically to attend the meeting on the afternoon of January 5th, that had been requested by the Pasco-Kennewick Building Trades secretary, Bud Shirk, through our Mr. Reed, and through phone communications to me we had arranged such a meeting, and on my arrival there the day preceding, the A.E.C. had indicated that they wished to have us meet with them prior to it, Mr. Reed was introduced around, and then we were asked if we would sit in that meeting that was taking place that morning. We were asked specifically by Mr. Thurston.

Q. All right, now, will you relate as nearly as you can recall what took place at this morning meeting, what was said by you, if anything, what was said by Mr. Reed, if anything, by Mr. Ross, by Mr. Davis. In other words, what was the meeting and what was said, as nearly as you can recall at this time?

A. Well, as the meeting opened, I remember explicitly that [983] Mr. McCaffree indicated that the presence of both Mr. Reed and myself was as observers to the meeting, and at that point I emphasized that myself to those in attendance at the meeting and concluded that if there were any objections on the part of any of the people in the meeting, that is, either of union representatives or of the Hanford Committee Representatives to our being there, we certainly would invite ourselves out very quickly;

(Testimony of Lee J. Knack.)

that we were not there except by their acquiescence to our being there as observers; and I quite definitely emphasized the fact that we were observers.

Q. Did anyone request that you leave?

A. No, sir.

Q. All right, then what occurred?

A. Considerable time was spent in discussion, primarily between Mr. McCaffree and Mr. Knapp, that conversation being along the lines of who did Mr. Knapp represent. There were some charges or statements made back and forth concerning other meetings that had been held with other crafts or requests for meetings that had been made to Mr. McCaffree and he, in turn, had not notified Mr. Knapp about it, and there was some allegations about some circumstances of Mr. McCaffree lending some support to other crafts pulling out of the Hanford Works [984] Association from the union standpoint, and there again the question came up as to who Mr. Knapp did represent for whom he was speaking in this particular meeting.

A good deal of the conversation swung along those questions, the question first of who did Mr. Knapp represent and the question of who Mr. McCaffree may have been meeting with or been agreeing to meet with through contacts, and so forth.

Q. What answers did Mr. Knapp give to these questions which were put to him by Mr. McCaffree as to who he did represent?

A. I don't recall that Mr. Knapp specifically identified who he represented. There was never any

(Testimony of Lee J. Knack.)

specific identification as to his representation. In one course of the meeting, and this, I think, was very shortly after Mr. Cochran came into the meeting, we had been in session, oh, I would say approximately three quarters of an hour, somewhere in that neighborhood, when Mr. Cochran came in late, and at approximately that time, shortly thereafter, I can very definitely recollect that the only other conversational participation that I had in that meeting was pointing out that insofar as Morrison-Knudsen Company was concerned, that as I could determine from what I was hearing and some of the information that I had, that we occupied a different position from any other contractors [985] then currently on the project in that we were not signatory to the Hanford Works Agreement, nor had we ever designated the Hanford Negotiating Committee as our agent and we were bound by an A.G.C. agreement, and it was at that time that I made specifically reference to the fact that that agreement had an inclusion in it which prohibited special job agreements and directed my references in that instance to Mr. Rossman, at which time Mr. Rossman indicated to me that he didn't wish to comment or to make any commitment to my observation, that he chose rather to get legal advice on the matter, and I indicated to him that I felt if I were in a similar position as he was, perhaps I would make the same observation.

Q. About how long did this meeting last in the morning, Mr. Knack?

(Testimony of Lee J. Knack.)

A. I would say somewhere in excess of an hour and under two hours.

Q. Do you recall any other specific items of discussion in the morning meeting?

A. Not any specific items, except that I do recall there was some humorous by-play when Mr. Cochran came in, some kidding and joking back and forth, and that occurred for just a few minutes.

Q. Now, reference has been made by a number of the [986] defendants' witnesses to a meeting held at the Pasco-Kennewick Building Trades Council headquarters on the afternoon of January 5th, of 1956. Do you recall the meeting?

A. Yes, I do.

Q. And Mr. Reed was there with you, as I understand it?

A. Yes, he was.

Q. Will you tell us who were present there, as nearly as you can recall?

A. Of course, there was Mr. Reed and myself, Mr. Bill Dunn, who did open the meeting in the capacity of chairman——

Q. That is William H. Dunn, who testified here as a witness?

A. Yes. There was a representative from the Sheet Metal Workers, as I remember, and a representative from the Roofers, Mr. Bud Shirk was there some of the time, Mr. Redmond of the Electricians was there, and there were others that by either association with their identities or of union affiliations or names I would not be able to recollect.

(Testimony of Lee J. Knack.)

There were many people in that meeting that I met that day for the first time.

Q. All right, now, will you tell us, as nearly as you can recall, the subjects which were discussed by you at that meeting?

A. Well, I recall—— [987]

Q. I understand this meeting took place about three hours in length or two and a half hours, and I don't want to get all of the entire meeting in the record, but I would like to know what the subjects were just by subject matter.

A. Well, first of all, was, of course, the introduction of Mr. Reed as project manager to the group and identifying who he would be. We then discussed — a subject which we discussed, a topic, was the nature of the contract that we had, the type of work that was involved, and the circumstances surrounding it, approximate schedules of anticipated requirements of manpower, anticipated completion time of the job, and so forth. We also discussed, and I should say that in saying these as topics, it was all discussion in that questions were asked and questions were answered.

The question of subcontractors was discussed — the topic of subcontractors was discussed. We discussed at quite some length, at least I did, the question of jurisdictional disputes, the company's policy in relation to jurisdictional disputes, and how I would request the business agents who would be involved in policing the work or furnishing services to the job, how I would expect them to work in

(Testimony of Lee J. Knack.)

relation to our policy on jurisdictional disputes. [988]

There was topics of some of Morrison-Knudsen's other work in other areas, specifically because Mr. Reed had just then recently come down from the Aluminum Company job in Canada. There was considerable comments and discussions about that, I suppose one might say as an interesting factor rather than as a related factor to the meeting itself.

Also discussed in connection with the jurisdictional problem which I brought up, there was a discussion on the part of one union representative, specifically, Mr. Dunn asked me if there was going to be any problem of them getting out to visit the job in order to investigate the conditions or circumstances. I was curious as to why such a question was raised and was told that there was a specific instance and there were instances where union representatives were unable to get on the site because of security provisions, and they felt that there were occasions when contractors were using that as a device to keep them off, rather than a cooperative effort to help them do the necessary investigating work that they had to do. Assurance was given that any business agent could visit our job without any difficulty.

We also mentioned the location of the office that we had been in a very short period of time there, what was going on in that office. [989]

We also had the customary number of jokes that are told in sessions such as that.

(Testimony of Lee J. Knack.)

There was also the question that was posed as to the circumstances relating to the practice that prevailed in the area of the payment of transportation or furnishing transportation and isolation pay.

Q. All right, now, on that subject, Mr. Knack, I want to ask you specifically, you were present in court during the testimony of Mr. Dunn and Mr. Rossman and Mr. Clarey. Without asking you to either dispute or approve what they said, I wish you to tell the Court now your recollection of exactly what question was asked you and what answer you gave to the question concerning the question of bus transportation and isolation pay.

A. Well, the question was put to me about the payment of bus — or furnishing of bus transportation and the payment of isolation pay, and my first and immediate reaction to it was that certainly I didn't think that it was fair for the——

Q. I want you to state what you said, not what your reaction was.

A. Well, I said this, this is what I said: This was my — when I said reaction, I should have said response. I said that it was not fair for the people there to figure that they could use the Morrison-Knudsen Company [990] as the solution to their problem or as a wedge when they had the problem with other contractors; that we certainly were not there to either be the solution to problems, nor to establish or break precedents, as the case may be; that their problems had to be dealt with with the people with whom they had the problem, and that

(Testimony of Lee J. Knack.)

insofar as the conditions and circumstances were involved, that we were not — I was not going to tell them that we were going to discontinue furnishing the transportation or paying the isolation pay, but that certainly there was a problem there that I didn't know when that problem was going to be answered, nor did I know how it was going to be answered, and, therefore, I felt that they were attempting to get the solution to the problem from me when I was not the party nor my company was the people who could solve the problem for them.

Q. Had you learned of this problem in this morning meeting at which Mr. Rossman and these other parties were present? A. Yes.

Q. I want to ask you specifically, Mr. Knack, what information, if any, you had at the time as to the basis upon which Morrison-Knudsen Company made its bid for the Hanford Works Contract? [991]

A. I had no knowledge as to how that job was specifically bid at that time.

Q. Why did you have no knowledge?

A. Well, the explanation for that, sir, requires a little bit of explanation of the relationship of how I function within the Labor Relations Department for the company.

Our company is set up in divisions and districts, and it is my job to service the various divisions and districts upon request. One of the services that my office furnishes to those divisions and districts is labor information on prospective jobs which are to be bid. At again by request of the district or divi-

(Testimony of Lee J. Knack.)

sion, will send me a form which we have and request me to fill in the form on the various crafts or classifications, and so forth. This job having been bid out of our Seattle District, I had not been requested to furnish the information, the labor information, for the bidding of this particular job.

Q. Then, as of the date of this meeting on January 5th, 1956, what information did you have as to whether bus transportation or isolation pay had or had not been included in any bid estimate?

A. I would have no information of that at all at that time.

Q. I wish to ask you the specific question, Mr. Knack, as to what statement you made at this meeting as to the [992] Morrison-Knudsen Company having bid this job on the basis of paying isolation pay and furnishing bus transportation?

A. There was some discussion as to how we may have bid the job and that resulted in my pointing out that the question of how we bid jobs and how we are going to operate those jobs is one that I would be quite interested in going into in a deeper vein in all areas, and pointed out that I had never yet been approached by any organized labor that would sit down at the time we were figuring a job or after we had figured a job and would agree to complete the job as we had bid it; that constantly we were confronted with the problem of bidding jobs and during the course and life of that job being confronted with rising costs of wage increase,

(Testimony of Lee J. Knack.)

labor costs, and so forth, and I made reference to that situation and pointed to one of the incidents that had occurred, a negotiation that I had just come off of where that was highlighted, Table Rock Dam down in Missouri, and spent some time explaining the situation about bidding jobs and the relationship as to how they are bid and the costs after we get them.

Q. I wish to ask you, Mr. Knack — I am reading now from a transcript of Mr. Knapp's testimony — if at this meeting you made this statement: [993]

“He said they would pay isolation pay and continue to furnish transportation. He said that the Morrison-Knudsen Company had bid the job planning on paying isolation pay and furnishing transportation; that was the way they figured the job.”

A. No, I did not.

Q. I am reading to you now from a transcript of the testimony of Mr. William H. Dunn. I wish to ask you if at this meeting on the 5th of January, 1956, you made this statement in response to the question which Mr. Knapp states he asked you:

“We bid this under the Hanford Works Agreement and we are going to do the job under that.”

A. I did not.

Q. Did you make any statement, Mr. Knack, other than as you have just testified here?

A. In relation——

Q. In relation to that particular subject?

A. Not — insofar as words are concerned, the

(Testimony of Lee J. Knack.)

substance of what was said is what I have testified to.

Q. Mr. Knack, when was the first time since January 5th of 1956 that you ever heard the contention made or a statement made that you had agreed in the meeting of [994] January 5th, 1956, that the Morrison-Knudsen Company would continue to furnish transportation and pay isolation pay upon the Hanford Works Project?

A. In this courtroom when these proceedings began.

Mr. DeGarmo: You may examine.

The Court: We will take a recess now for ten minutes.

(Short recess.)

The Court: Had you finished, Mr. DeGarmo?

Mr. DeGarmo: Yes, I was through.

The Court: All right, cross-examination.

Cross-Examination

By Mr. Etter:

Q. Now, as I understand, Mr. Knack, when this matter of the isolation pay and the bus transportation came up in this meeting, you advised these people, that is, the men who were gathered there, that you didn't think it was proper for them to use M-K for a wedge or for a solution of the problem, that you said that? A. Yes.

Q. And you weren't there to solve or to break precedents, is that correct?

(Testimony of Lee J. Knack.)

A. That is correct.

Q. And I gather this all concerned bus transportation and [995] isolation pay? A. Yes.

Q. And that you said that they had to deal with those who had the problem? A. Yes.

Q. And at that time, were you made aware of the fact that it was an important problem to the people that inquired of you about bus transportation and isolation pay?

A. Well, not as such. I mean, my awareness of the problem arose from my having been in the morning meeting as an observer and I was familiar with the situation to that extent.

Q. Well, but I mean these men who asked about it, did you gather that it was an important problem with them?

A. Well, again, I gathered it from the circumstances that I was acquainted with and not by any specific reference that they may have made.

Q. Well, from what you had known before, did you gather that it was important to them from the questions they asked you about it?

A. I would have gathered that it was important, yes.

Q. I see. Well, were they at that time interested in whether or not you were going to continue bus transportation and were going to continue to pay isolation pay?

A. Well, actually, the question as to how the job may have [996] been bid, came into the discussion, I did not——

(Testimony of Lee J. Knack.)

Q. No, no, I am not asking you that, I am asking you if they asked you whether you were going to pay the isolation pay and whether M-K was going to retain the bus transportation? Did they ask you that?

A. They asked me the question, yes, they brought it up for discussion.

Q. Well, when they asked you that question, whether you were going to do it or whether you were not going to do it, did you tell them one way or the other what you were going to do?

A. I indicated that under the circumstances that I was going to tell them that at the time we were not going to discontinue the furnishing of the transportation and the payment of isolation pay.

Q. What did you say then, that you were not going to discontinue isolation pay or bus transportation?

A. As of that time?

Q. Yes, as of that time?

A. That is correct.

Q. What time did you tell them, as of the 5th?

A. Of what time did I tell them what, sir?

Q. Yes, you say now that what you told them was you were not going to discontinue the isolation pay and you were not going to discontinue the bus transportation? [997]

A. That is correct.

Q. Well, did you say, did you qualify that and say "Now" or "Until the end of this job" or "Halfway through this job?" How did you qualify that, if you did qualify it?

(Testimony of Lee J. Knack.)

A. I didn't qualify it.

Q. I see. Then, what you said was, "We are not going to discontinue it?"

A. "At this time."

Q. I see. "At this time?" A. Yes.

Q. In other words, now——

A. Indicating and going on to the point that they had the problem with the other people there and the question of the isolation pay and the bus transportation insofar as future was concerned was a problem for them to solve with the people with whom they had been dealing and the other contractors.

Q. Well, didn't they ask you whether you were going to continue this on your contract? Isn't that what they said?

A. They wanted to know if we were going to pay it——

Q. Yes. A. ——at that time, certainly.

Q. Yes. And you said you were?

A. Yes, I said that we were not going to discontinue it at [998] that time.

Q. I see. You didn't say to them that, "We have a contract that became effective four days ago that absolves us from paying any isolation pay or providing any busses"? Did you say that to any of them?

A. No, I didn't say that to the group, because the people who were in the group, there were many representatives in the group with whom we had no agreements and there were many representatives in

(Testimony of Lee J. Knack.)

the group that worked for subcontractors under different agreements.

Q. But there were representatives there that you had agreements with, were there not, on that project?

A. Insofar as the Operating Engineers were concerned, they were present there, yes.

Q. Did you say to Mr. Rossman or to Mr. Dunn that, "We don't—we are not interested, we have no problem, because we have a contract?"

A. No, I didn't say it in that meeting, because in the morning meeting I had made reference to it to Mr. Rossman and he had indicated to me that he didn't wish to reply to the commitment, he wished to get legal counsel on the situation, and on that basis I certainly didn't expect that Mr. Rossman would have had an answer by that afternoon.

Q. You say that he inquired of you about the bus transportation [999] and the isolation pay in the morning?

A. No, no, Mr. Rossman did not inquire that of me at all.

Q. I see.

A. I mean, I made the observation myself that we were in a different position from other contractors in the area.

Q. I see. But this conversation that you had, there was some discussion that was more than cursory about the bus transportation and the isolation pay?

A. Yes, it was more than cursory. I think that

(Testimony of Lee J. Knack.)

it is proper to say that, insofar as the discussion in the afternoon relating to this question, Mr. Rossman did not make any statements in the afternoon meeting in relation to it.

Q. No, but I mean the discussion in the afternoon meeting was not a cursory discussion?

A. Well, it would depend on what you would mean as to "cursory," sir, because the question, the discussion, was not involving all the people in the room. There were many people——

Q. Well, whichever ones it might have involved, you did, however, continue to pay the isolation pay and the bus transportation up until the 22nd of March?

A. That is true, yes.

Q. Is that correct?

A. Yes. [1000]

Q. And made no indication up until that time through any party at all that you were going to discontinue it?

A. Through our agent, the A.G.C.

Q. Well, not until March, however?

A. I wouldn't know of those dates, sir, because I wasn't present at any of the meetings.

Q. Well, you don't know that any earlier notification otherwise was given until the date indicated in the testimony here, which is sometime in March?

A. I had no contact with any representatives in relation to the Hanford Works Project after January 1st, either by phone or otherwise.

Q. After January 5th?

A. After January 5th, I'm sorry.

(Testimony of Lee J. Knack.)

Q. No further contacts of any kind?

A. With any representatives of the unions in relation to the Hanford job.

Q. I see.

Mr. Etter: That is all. Oh, Mr. Carey.

Mr. Carey: May I?

The Court: Yes.

Cross-Examination

By Mr. Carey:

Q. Mr. Knack, you recall, no doubt, that on the afternoon [1001] of the first day of trial, which was the 10th, that you testified, at least generally, about this same subject of this meeting, or these two meetings? A. Yes, sir.

Q. Do you recall that the following morning I undertook to cross-examine you?

A. Yes, I do.

Q. Now, in your examination here, direct examination, just concluded, you said something to the effect that Morrison-Knudsen did not want to get itself in the position of being a wedge. Do you recall that?

A. I said, I think, that we didn't want to be used as a wedge.

Q. Used as a wedge? A. Yes, sir.

Q. Yes. On the former occasion, you used the expression as I recall, several times that Morrison-Knudsen didn't want to get in the position of being "in the bight of the line." Do you remember that?

A. I think I said words to that effect, sir.

(Testimony of Lee J. Knack.)

Q. Yes. Now, I know what "bight of the line" means on the Seattle waterfront, but I don't know that I know what it means east of the mountains. Now, this meeting on the morning which was at Richland, as I recall your statement, that was more or less casual, that is—— [1002]

A. I don't recall, sir, at all that I indicated that the morning meeting was casual at all, because sitting as an observer, my observations were that it was anything but casual.

Q. Well, did you go to Pasco or Richland specifically to participate in those meetings on that day?

A. I went specifically to participate in the afternoon meeting at Pasco.

Q. That was my understanding. I think you testified on the former occasion that that meeting had been arranged some time in advance, the afternoon meeting, I am speaking of now.

A. Yes, the meeting between the Building Trades Council and the Morrison-Knudsen Company had been arranged from contacts that had started some time in mid-December between Mr. Reed and Mr. Bud Shirk.

Q. Well, did you go to Pasco and Kennewick or Richland specifically to attend that pre-arranged meeting that occurred in the afternoon of the 5th?

A. Yes, that was the purpose of my visit there.

Q. Yes. You, I assume, had a personal acquaintance with Mr. Rossman, Mr. Knapp, most of the representatives of the unions, before that meeting?

(Testimony of Lee J. Knack.)

A. I had a personal acquaintance with comparatively few of them, sir, because I hadn't been in Pasco for quite some [1003] time prior to this and I, of course, knew Mr. Rossman very well. I knew Mr. Knapp on the basis that I may have met him on approximately five or six times very briefly prior to that time and some three or four—three years prior to that time. There were others in the meeting that—in the afternoon meeting—whom I met as of that afternoon for the first time.

Q. Now, you were there in company with Mr. Reed, Mr. Ray Reed—— A. That is correct.

Q. ——who was introduced as the project manager? A. That is correct, sir.

Q. And so far as Morrison-Knudsen was concerned, it was a serious meeting having to do with discussions of various problems that might arise during the course of this very important job?

A. Well, as to what the nature of those meetings are, before you go into them, pre-job conference meetings, as has been acquainted, meetings of jobs of this proportion, and they vary considerably, so I would have no knowledge or have no idea of what the nature of that meeting would be until I actually got into the meeting. Quite often they are no more than, again using the phrase that you mentioned, casual in nature.

Q. At any rate, was this Mr. Reed's first assignment to work [1004] in that area?

A. To my knowledge, yes.

Q. Well, when this problem was put up to you

(Testimony of Lee J. Knack.)

—I am speaking now about the discussion of isolation pay and transportation—you knew that had been the matter of, we'll say, difference of opinion between the unions and the contractors for some time?

A. As to the length of time and the circumstances involved, Mr. Carey, I wasn't too familiar with it, frankly, because, as I said before, I had not been in the Pasco area for some years and the first-hand knowledge that I had of any conditions or circumstances was on my arrival in Richland on the 4th and most of that information that I obtained, the initial information, was in conversations with Mr. Thurston of the A.E.C. and some other people, and that was in the morning of the 5th prior to the meeting with the unions in the morning of the 5th. Mr. Reed and I visited the A.E.C. operations and were introduced to some of the personnel whom we didn't know by A.E.C. people, and we were somewhat briefed that there was a problem there by those people.

Q. Well, isn't it a fact, Mr. Knack, that what you meant, or the view you intended to express, in that meeting representing Morrison-Knudsen, you did not want to be forced into a position, at the instance of other [1005] contractors or anybody else, which would put you in conflict with the unions on the job then in progress?

A. I don't think I expressed it that way, Mr. Carey. To me, having come into the area and not having had some, at least, current background of

(Testimony of Lee J. Knack.)

the circumstances and conditions, I was aware only of the fact that there was a problem there and the details of that problem and the intrigues that may have been involved in meetings, and so forth, I was totally unaware of it, and in my conversations with Mr. Thurston the morning before we met with the unions, Mr. Thurston requested the Morrison-Knudsen Company to continue paying the isolation pay and the furnishing of bus transportation. At the time, I asked him if that was an official request. He said, because of the circumstances, he could only make it as an unofficial request. That was part of the circumstances.

Mr. Carey: Well, will you read my question again?

(Question read.)

Q. (By Mr. Carey): Isn't that, in substance, the position you took?

A. Well, sir, when you asked the question about being forced by other contractors, I felt no factor of force by other contractors at all. [1006]

Q. Well, isn't that, in substance, what you meant when this morning you said you didn't want to be used as a wedge, when last Monday or a week ago Monday you said you didn't want to get "in the bight of the line"? Isn't that, in substance, what you meant?

A. Well, in substance, what I meant, sir, was that I didn't want to be—our company to be the people who were going to lead the way and be put

(Testimony of Lee J. Knack.)

in a position—as a newcomer to the work, we had not been involved in these things in the past, our position was somewhat different from other contractors, substantially different, as a matter of fact, and that I didn't want my company being the company that was going to be the party to come into that area and cause conditions, either to the area or to ourselves——

Q. That is, you didn't want to disrupt a working arrangement that had been in existence for some considerable time?

A. At the particular time, in view of the conversations that I had had with Mr. Thurston, I felt that it was expedient for our company, even though the request had been unofficial, under the circumstances, to abide by that request.

Q. Yes. I think there is one other question. Did you hear any jokes there that were worth repeating? [1007]

A. Well, Mr. Carey, in that respect I would have to say yes, because I think I told most of the jokes.

The Court: That is a matter for the recess.

Mr. Carey: All right.

The Court: Any other questions?

Mr. Carey: No, that is all.

Mr. DeGarmo: I have just one question.

(Testimony of Lee J. Knack.)

Redirect Examination

By Mr. DeGarmo:

Q. Mr. Knack, was there a difference in the situation of Morrison-Knudsen Company with Mr. Charles Knapp and his local, the Cement Finishers, and the situation of Morrison-Knudsen Company with the Operating Engineers and the Teamsters?

A. Insofar as I knew at that time, there was no agreement between the Cement Finishers and the Morrison-Knudsen Company, either direct or through the A.G.C.

Q. But you did have an agreement with both of the other two that I have mentioned through the A.G.C.?

A. Yes, that is correct.

Mr. DeGarmo: That is the only question I had.

Recross-Examination

By Mr. Etter:

Q. You, of course, didn't point that out to Mr. Knapp or to [1008] Mr. Rossman or to Mr. Dunn?

A. Again in the afternoon meeting, I did not point it out to Mr. Knapp or Mr. Dunn.

Mr. Etter: All right, that is all.

Mr. DeGarmo: That is all, Mr. Knack.

Call Mr. McCaffree.

(Witness excused.)

KENNETH M. McCaffree

called and sworn as a witness on behalf of the plaintiff in rebuttal, was examined and testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Mr. McCaffree—perhaps I should say Dr. McCaffree—will you state where you reside?

A. Seattle, Washington.

Q. And what is your occupation or profession?

A. I am a University professor.

Q. At what university?

A. The University of Washington.

Q. And for what period of time have you been a professor at the University of Washington?

A. I have been under contract with the University since 1949. Two years during that time I was on leave of absence without pay. [1009]

Q. And during that period of time when you were on leave of absence without pay, were you in some manner connected with the Hanford Contractors Negotiating Committee?

A. For the period beginning in March, 1953, until October, 1954, I served as Executive Secretary of the Hanford Contractors Negotiating Committee. I was also more generally known as the labor coordinator, construction contract, or coordinator for labor relations.

Q. Doctor, will you state for the record your age?

A. I am 37. I will be 38 next week.

Q. In order that we may have some background

(Testimony of Kenneth M. McCaffree.)

of your experience in the labor relations field, will you state what educational background you have and what experience you have had in that field?

A. I have a Doctor of Philosophy degree from — in Economics — from the University of Chicago, granted in 1950. My major field of interest was labor economics and industrial relations. The years '48 and '49 I was a research assistant with the University of Chicago. Since 1949, I have been teaching labor relations, primarily, at the University of Washington, although I teach some introductory and intermediate economics.

In addition to the experience at Hanford, I was for eight months associated with the 13th Regional Wage [1010] Stabilization Board as a supervisor in the case analysis division. I have done a certain amount of reading and writing in the field.

Q. Doctor, are you familiar with the document which has been popularly referred to as the Hanford Works Agreement?

A. This is the agreement which was in effect at the Hanford Project for, I guess, September, October, 1952, for a period of months thereafter.

Q. As I understand it, you first came to the Hanford Project in 1953, which would be subsequent to the date of the negotiation and the execution of that agreement by the Hanford Contractors Negotiating Committee?

A. That is correct.

Q. I am handing you, Doctor, that which has been introduced in evidence here as Plaintiff's Ex-

(Testimony of Kenneth M. McCaffree.)

hibit 6. Will you examine it and state what it is, if you recognize it?

A. This is a copy of the Hanford Works Agreement entered into on the 29th day of September, 1952, and I presume the attached Schedule A is for the respective crafts that were signatory thereto.

Q. Doctor, were you ever personally a member of the Hanford Contractors Negotiating Committee, as such?

A. I was never so considered by the contractors. I was designated, actually, as the administrative staff to the [1011] committee and referred to as the executive secretary. It is true in 1955 that I did on occasion serve as the spokesman for the committee.

Q. But you were not an officially designated member?

A. I was not officially designated as a member.

Q. I am calling your attention, Dr. McCaffree, to the last page of the first and general portion of the agreement, Exhibit 6, to a portion which reads, "In witness whereof, the parties have caused this agreement to be executed by their duly authorized representatives," below which appears a line with the word "Contractor" underneath "By," and I wish to ask you whether, to your knowledge, the Hanford Works Agreement was ever actually signed by the contractors performing work at the Hanford Works Project?

A. I have seen the signatures of four individuals representing four separate contractors with A.E.C. contracts at Hanford. These were the Atkin-

(Testimony of Kenneth M. McCaffree.)

son-Jones joint venture, Kaiser Engineers, Blaw-Knox Company, and the J. A. Jones Construction Company.

Q. Now, in relation to the amount of work which was done at the Hanford Works, where would these four contractors that you have mentioned fit into the scale? Would they be considered as the larger contractors or would they be some of the smaller contractors? [1012]

A. Well, certainly, until into 1955, they would represent something over 90 per cent of the employment, construction employment, on the Project.

Q. I want to call your attention, Doctor, to the preliminary paragraph of the Hanford Works Agreement, Plaintiff's Exhibit 6, and particularly to the statement, "This collective bargaining agreement (hereinafter called the agreement) by and between the signatory construction contractors, representing and acting for contractors who presently or during the life of this agreement become signatory to this agreement and perform construction, alteration, or repair of public works at the Hanford Works, State of Washington," and I wish to ask you, during the period of the negotiations in 1955 with labor unions, who the Hanford Contractors Negotiating Committee of which you were the executive secretary was representing?

A. Well, we were representing the contractors who were signatory to the Hanford Works Agreement.

Q. Anyone else?

(Testimony of Kenneth M. McCaffree.)

A. Not to my knowledge.

Q. Did you represent the Morrison-Knudsen Company at that time?

A. To my knowledge, they were not signatory to the agreement, therefore we did not represent them. [1013]

Q. All right, now, in the period from January 1, 1956, until the 8th of March, 1956, there has been testimony that there were some negotiations between labor unions and the Hanford Contractors Negotiating Committee. I wish to ask you who the Hanford Contractors Negotiating Committee was representing in connection with those negotiations?

A. We were representing the same group which we were representing prior to January 1st, 1956.

Q. Dr. McCaffree, what was the arrangement by which your salary was paid as executive secretary in the period from, say, October of '55 until your services were terminated?

A. I was hired, actually, as a subcontractor, a consultant, with the contract with the J. A. Jones Construction Company. This was a consultant agreement and, I think, took the general status as of a subcontractor.

Q. What type of a contractor was the J. A. Jones Construction Company with the Atomic Energy Commission?

A. They are cost-plus-fixed-fee.

Q. That is a reimbursable type of contract, then?

A. Yes, sir.

Q. So that is it a true statement, Doctor, that

(Testimony of Kenneth M. McCaffree.)

your salary then would have been reimbursed to J. A. Jones Construction Company by the Atomic Energy Commission? [1014]

A. That is correct.

Q. Now, there is evidence here, Doctor, that as of March 8, 1956, a meeting of March 8 with representatives of the Pasco-Kennewick Building Trades Council, some statement was made concerning the termination of negotiations by the Hanford Contractors Negotiating Committee. Were you present at that meeting?

A. What was the date again?

Q. March 8, 1956.

A. And who did you ask as representatives there?

Q. I asked if you were present at that meeting.

A. I was present at a meeting on March 8th, held in Richland, Washington.

Q. With representatives of the Pasco-Kennewick Building Trades Council?

A. I believe, if I recall correctly, that the meeting was between the Teamster Local 839 and representatives of the Hanford Contractors Negotiating Committee.

Q. All right, subsequent to the 8th, to your knowledge, were any negotiations held between the Hanford Contractors Negotiating Committee and the unions?

A. Which unions, now?

Q. The Teamsters, Operating Engineers, and Cement Finishers?

A. None.

(Testimony of Kenneth M. McCaffree.)

Q. As of a date, any date subsequent to March 8, 1956, did [1015] you attend any meeting or meetings held by either the Associated General Contractors of America, Spokane Chapters, either Heavy Highway and Engineering, Construction and Building, or by the Federal Mediation and Conciliation Service?

A. There were three meetings held in March. They have been mentioned before. I believe March 10th, 16th, and 21st. I was in attendance at all of those meetings.

Q. On whose payroll were you at that time?

A. The same situation as previously, I was paid by the J. A. Jones Construction Company under the consultant agreement.

Q. And on whose behalf did you attend those three meetings that you have mentioned?

A. I was there as a representative and assistant to Mr. McReynolds, who was the project manager of J. A. Jones. I was, in effect, representing the J. A. Jones Company.

Q. You were not there as executive secretary of the Hanford Contractors Negotiating Committee, then? A. I was not.

Q. Doctor, do you recall an instance which occurred, I believe, in 1954, when certain forms relating to health and welfare benefits were brought to you? A. Well——

Q. Just state first whether you recollect such an instance? [1016]

A. Yes, yes.

(Testimony of Kenneth M. McCaffree.)

Q. Will you state from what organizations these forms were brought to you as the executive secretary of the Hanford Negotiating Committee?

A. They were furnished me by a representative from the Teamsters and also one from the Operating Engineers.

Q. Do you have available at this time any of those forms which were presented to you?

A. I do not.

Q. Can you state what the nature of them was?

A. Well, the nature was an agreement to be signed by the union and a particular employer whereby the payments to the health and welfare funds, which were then going into effect in July of 1954, could properly be made. I believe it was in recognition that a written agreement is required between the contractor and the union for payments to be legally made by a contractor to a trust fund, and the purpose of these letter agreements—they were printed forms in both cases, as I recall—was to get all contractors on the project properly signed so that they might properly make payments into these particular trust funds.

Q. What did you do with the agreements after they were delivered to you?

A. I took blank copies, enclosed them with a covering letter, [1017] and mailed them to all contractors whose names and addresses I had, who at that time I knew to have work on the project.

Q. Was Morrison-Knudsen Company working on the project at that time?

(Testimony of Kenneth M. McCaffree.)

A. They were not.

Mr. DeGarmo: You may examine.

Cross-Examination

By Mr. Etter:

Q. In September of 1955, what contractors were on the Hanford Area doing work under A.E.C. contracts actively who were signatory to the agreement, Dr. McCaffree?

A. The only firm which I know positively to have signed the agreement was the J. A. Jones Construction Company.

Q. Blaw-Knox were not there? A. No.

Q. Or Kaiser? A. No.

Q. And at that time, of course, Morrison-Knudsen hadn't come on the job? A. I believe not.

Q. Then, as I understand it, on behalf of J. A. Jones, I suppose it would be, you entered negotiations sometime in October or otherwise with the unions, did you? When [1018] did your negotiations on behalf of the Hanford Contractors Negotiating Committee start?

A. With respect to which crafts?

Q. With respect to any of them, first?

A. Well, as a matter of record, we were virtually in continual negotiations. There was some crafts whose Schedule A or other agreement was open for negotiation.

Q. I see. When were negotiations opened by you with the Operating Engineers, Local No. 370, and the Teamsters, Local No. 839?

(Testimony of Kenneth M. McCaffree.)

A. Well, I mailed letters on October 28th indicating that. I believe at that time I had received letters from both Mr. Davis and Mr. Rossman to the effect that they wished to open the agreement.

Q. I see.

A. From both. I couldn't be positive, it was approximately at the same time.

Q. What month? I didn't get you.

A. October.

Q. October. And I suppose that pursuant thereto, you had some meetings and exchanges of correspondence with them?

A. I answered their letters, yes, sir.

Q. That is what I mean. And had some meetings, is that correct?

A. We held a meeting on November 10th. [1019]

Q. On November 10th? A. Yes.

Q. Of 1955?

A. Yes. This was a meeting with the Building Trades Council.

Q. With the Building Trades Council?

A. Teamsters——

Q. Beg your pardon?

A. Teamsters and Engineers were there.

Q. Yes, they are associated and are members, are they not, of the Council?

A. Well, I have seen no written authorization to that effect. I have been told that that is true.

Q. I see. In negotiating with them, did you show them any written authorization from J. A. Jones?

(Testimony of Kenneth M. McCaffree.)

A. I was asked for none.

Q. I see. Did you ask them for any?

A. I asked—I believe not at that meeting.

Q. I see. Now, when was the next meeting that you had with them in 1955?

A. Who are “them”?

Q. Beg your pardon.

A. Who are them”?

Q. The defendants, Locals 839 and 370. I think you said your first meeting was November 10th at which they were [1020] present.

A. This was a meeting at which they were present?

Q. That’s right.

A. We held a meeting on December 14th, at which Mr. Charlie Knapp and Mr. Bud Shirk were present. Now, Mr. Shirk was secretary of the Building Trades Council and was the individual with whom I at that time was corresponding and talking by phone and otherwise concerning the status of the Hanford Works Agreement. I, at this point, do not recall whether there were any representatives of either the Engineers or Teamsters present at that meeting.

Q. You do not recall whether they were there at that meeting?

A. That is right.

Q. Can you tell me the date of a meeting that you had in 1955, and subsequent to November 10th at which you recall that the Engineers and the Teamsters were represented?

A. December 22nd.

(Testimony of Kenneth M. McCaffree.)

Q. December the 22nd? A. Yes, sir.

Q. And you were there, of course, in your capacity as secretary, as I understand it, of the Hanford Contractors Negotiating Committee?

A. That is correct, and I believe also at both of those [1021] meetings I served most of the time as spokesman for the committee.

Q. At those meetings?

A. I believe that is November 10th and December 22nd, 1955.

Q. Both meetings you have reference to when you acted as spokesman?

A. I do not recall that I was the spokesman throughout.

Q. I see.

A. Mr. Cochran or Mr. McReynolds on occasion was the spokesman for the committee.

Q. You did act, however, in the capacity as spokesman at times? A. Yes.

Q. Did you have any further meetings in 1955, after December the 22nd? A. No, sir.

Q. You did not. When was it, do you recall, that you had any further meetings, let us say, in 1956, with representatives of the Engineers, Operating Engineers 370, and Teamsters 839?

A. At which they were present?

Q. Yes, at which they were present or represented.

A. Well, there were representatives of both unions present at a meeting which I attended on the morning of January 5th. [1022]

(Testimony of Kenneth M. McCaffree.)

Q. On the morning of January 5th?

A. 1956.

Q. I see. That is the meeting that has been discussed here? A. Yes, sir.

Q. All right. Other than that meeting, can you tell us any meeting that you had with them in which there were negotiations or bargaining of any kind carried on subsequent to January 5th, 1956, and I refer now to the Teamsters 839 and the Engineers 370?

A. Would you read the question back? At least, the first part of it.

(Question read.)

A. There was a meeting on February 10th at which representatives of the Operating Engineers and Teamsters were present.

Q. Do you recall whether there was a meeting in mid-January or not?

A. As I recall, there was not.

Q. There was not. You sent some proposals, however, to the Teamsters and Engineers in mid January, did you not?

A. I did not. I sent a proposal to the Operating Engineers.

Q. To the Operating Engineers. In mid-January, is that correct? I think there is an exhibit here——

A. Well, I would like to refresh my memory whether it was [1023] mid-January or late January.

(Testimony of Kenneth M. McCaffree.)

Q. Well, fine. January 13th, would you recognize that or would that refresh your recollection?

A. Yes, January 13th.

Q. January 13th. As I gather, there wasn't any meeting preceded this that you recall?

A. The January 5th meeting?

Q. The January 5th meeting. I mean, where there was strictly the matter of negotiations and, let's say, subsequent to the January 5th meeting, there was none intervened between?

A. As I recall, there was not.

Q. Now, you, I think, became the executive secretary, you said, sometime in 1953, is that correct?

A. Yes, sir.

Q. And do you recall what time of the year it was, Mr. McCaffree?

A. March, 1953.

Q. In March of 1953. Had an agreement been negotiated then or prior to the time of your taking this position, had an agreement been negotiated for that year, that is, 1953, or did you participate in any negotiations for that year, as best you can recall?

A. Well, the basic agreement had been negotiated and signed the preceding fall before I arrived, and I understand [1024] also an attachment covering the Operating Engineers and the Teamsters had been previously negotiated, at least there were evidences that it had been signed.

Q. I see. You do not recall that you did any work or negotiation toward an agreement other than the basic agreement, that is, in the early part of '53?

(Testimony of Kenneth M. McCaffree.)

A. I did not participate in negotiating of the basic agreement.

Q. Yes. Now, in 1953, did you act as the secretary at negotiations that were subsequently carried on, that is, after your appointment in 1953, covering the year 1954?

A. Yes, sir. Maybe I should ask, to clarify, you are referring specifically to the unions in question or any unions connected with the Building Trades Council?

Q. Well, first, any unions?

A. Well, I think that I attended most of them.

Q. I see. Then did you also attend meetings as secretary for the Hanford Contractors Negotiating Committee with the Teamsters 839 and Operating Engineers 370?

A. Yes, sir.

Q. You did. And——

A. I attended most meetings with them in 1953.

Q. Yes. Looking toward agreement in [1025] 1954?

A. No, sir.

Q. Did you attend any meetings having to do with negotiating an agreement for 1954?

A. Yes, sir.

Q. With the Teamsters?

A. Yes, sir.

Q. And with the Engineers?

A. Yes, sir.

Q. I see. Now, in 1954 when you were acting as the secretary of this committee, Mr. McCaffree, how many contractors then on the project had signed the particular agreement authorizing negotiation by the committee of which you were secretary?

(Testimony of Kenneth M. McCaffree.)

A. What do you mean, signed authorizations?

Q. Well, as I understood it, you said that there were four that you know of that had signed the Hanford Agreement.

A. That is right.

Q. Is that what you testified to?

A. Yes, sir.

Q. All right, how many had signed the Hanford Agreement that you know of in 1953 when you were pursuing these negotiations that I have asked you about, if you recall?

A. I do not recall that as of 1953, prior to the negotiations which were held with the Teamsters and Engineers, that I knew that any particular contractor had signed [1026] the agreement.

Q. Do you know how many contractors were on the project working under A.E.C. contracts?

A. At what time?

Q. In 1953 and during the time when you were carrying on these negotiations as secretary of the Hanford Contractors Negotiating Committee with the defendants, Teamsters and Engineers?

A. I could only give you an estimate.

Q. How many?

A. Well, I would judge in the summer of '53 that there were perhaps 60 different contractors at that time.

Q. 60 different contractors?

A. This would be primes and subcontractors and three or four that I remember sub-sub-sub contractors.

The Court: Time to recess now until 2 o'clock.

(Whereupon, the trial in the instant cause was recessed until 2 o'clock p.m., this [1027] date.)

2:00 o'Clock P.M., Tuesday, June 18, 1957

(Whereupon, the trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had:)

KENNETH M. McCaffree

having previously been sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Etter:

Q. Dr. McCaffree, can you tell me approximately about how many contractors were on the Hanford Project with A.E.C. contracts of some kind or other in 1954, or did you tell me that before?

A. I think our previous reference was with respect to the summer of '53.

Q. Oh, I see. Do you recall in '54?

A. Well, at the time of the work stoppage in January of 1954, there were 112.

Q. You are referring to '55, are you not?

A. No, '54.

Q. No, '54? [1028] A. This was——

Q. Another one? A. Another dispute.

Q. There were 112, you say?

(Testimony of Kenneth M. McCaffree.)

A. I believe that is correct. We counted them rather carefully. Again, this includes not only prime contractors and general contractors, but subcontractors and sub-sub-sub, and so on.

Q. That is correct. And in 1955, what was the situation then, early part of 1955?

A. Well, it was substantially reduced from the year previous. Again, I would be guessing, perhaps half that many, fifty or sixty.

Q. Substantially reduced in the latter part of '55?

A. Oh, yes, yes.

Q. Now, I notice here on January the 13th, you have identified this document as being a proposal that was made on behalf of the contractors, Hanford Contractors Negotiating Committee?

A. Yes.

Q. And I see Mr. McReynolds' name and I gather Mr. McReynolds is an official of some kind or other of L. H. Hoffman?

A. No.

Q. Did you say? [1029]

A. He is the project manager for J. A. Jones Construction Company.

Q. Oh, that's right, for J. A. Jones, and Mr. Garrett—

A. He was the project superintendent for the Sound Construction.

Q. Oh, I see. And Mr. Cochran?

A. The project manager for L. H. Hoffman.

Q. And you as the—

A. That is correct.

Q. —secretary. And then I notice that a further proposal appears sometime in March, ap-

(Testimony of Kenneth M. McCaffree.)

parently with Mr. McReynolds, Mr. Cochran. Mr. Cochran was Hoffman, was he not? A. Yes.

Q. And you, is that correct? A. Yes.

Q. And here is one, I think, on March the 2nd identified as having been sent—Exhibit No. 15—sent by you as executive secretary, is that correct, to the Teamsters 839? A. Yes.

Q. And in December, it has already been indicated from I notice here on the 15th, another proposal sent from you apparently on behalf of the Committee, which is Exhibit No. 12, is that [1030] correct? A. Yes.

Q. Now, I gather from your testimony that the Morrison-Knudsen Company has not signed the Hanford Works Agreement, is that right?

A. To my knowledge, they had not.

Q. They had not? A. They had not.

Q. And they did not. Now, in 1953 or on into 1954 when an agreement was negotiated, do you know whether the 40 or 50 contractors on the project to whom you have referred, whether they followed the terms of the agreement that had been negotiated by you for the committee or by the committee with you as secretary?

A. Now you are referring here specifically to Teamsters and Operating Engineers? I just want to be clear.

Q. Yes, yes.

A. In other words, when you asked me about agreements, it is applying specifically to the Operating Engineers and Teamsters agreement?

(Testimony of Kenneth M. McCaffree.)

Q. It is now, uh-huh.

A. Now, what was the question again?

Q. When you signed agreements with the Teamsters and the Operating Engineers in 1953, did the other contractors and subcontractors on the project, some 60 in number you have mentioned who employed members of those unions, [1031] did they observe the agreement or the conditions of the agreement which you had signed and negotiated with the Teamsters and the Engineers?

A. Well, I think you should clarify first that, to my understanding, the committee did not sign the agreements.

Q. All right——

A. To the extent that understandings were arrived at by the committee which I then forwarded copies of to contractors. As far as I knew, the contractors on the project did put those conditions into effect.

Q. They did put them into effect?

A. I would only learn if they did not, I think.

Q. If they did not. And inasmuch as you cannot recall, you assume that you did, is that what you are saying?

A. Well, I know of at least one case, apparently there was at least some disagreement as to whether they were put in effect or not.

Q. I see. Was that straightened up or not?

A. I don't know as to the final disposition.

Q. If I asked you that same question with re-

(Testimony of Kenneth M. McCaffree.)

spect to 1954, would your answer be the same, Mr. McCaffree?

A. I think that as far as I know, the contractors did follow the recommendations of the Hanford Contractors Negotiating Committee. [1032]

Q. And again in '55? A. Yes.

Q. Now, in other agreements you signed on behalf of the Hanford Contractors Negotiating Committee with other crafts involved on the project, if I asked you the same question with respect to those other crafts, would your answer be the same as to those three years?

A. Well, again, I would answer it this way, that so far as I know, the contractors did follow the recommendations of the Hanford Contractors Negotiating Committee.

Q. I see. Now, I notice on your stationery on all of these exhibits where they are Hanford Contractors Negotiating Committee, the bottom, Construction Contractors of the U. S. Atomic Energy Commission, Hanford Operations Office. Do you notice that? A. Yes.

Q. Well, actually, did that refer to all the construction contractors of the U. S. Atomic Energy Commission, Hanford Operations Office? Did that apply to all of the contractors with A.E.C. contracts on the Project?

A. Well, there, to the extent that my services went beyond that of the executive secretary of the Negotiating Committee, I did other tasks and other duties that involved all contractors. This stationery

(Testimony of Kenneth M. McCaffree.)

wasn't used solely in correspondence with the unions, you realize. [1033]

Q. No, but as I gather, in your educational background of some experience, not only in the formal part of the study of labor economics and collective bargaining, but also in the actual practice, have you not——

A. To some extent.

Q. To the extent, at least, that you have testified?

A. Yes, sir.

Q. Construction contractors of the Atomic Energy Commission, Hanford Operations Office, wouldn't you think, in collective bargaining negotiations, it could be assumed that this was representative of what it indicates there, construction contractors of the U. S. Atomic Energy Commission, Hanford Office, that that would be all-inclusive?

A. That phrase was added for a very particular reason, Mr. Etter.

Q. Well——

A. There are contractors on the project other than construction contractors.

Q. Whatever the reason may be, did you advise any of the unions of the qualification or the limitation of that particular phrase that appears on all of the Committee's stationery?

A. I was never asked by any of them.

Q. You were never asked and I assume you never volunteered it? [1034]

A. I saw no reason to.

Q. Well, when you were negotiating with them,

(Testimony of Kenneth M. McCaffree.)

did you purport to be representing, or your committee, the contractors that had A.E.C. contracts——

A. I think we were a group which purported to arrive at things which we could recommend to contractors at the Hanford Project. If they chose to follow them, it was the contractors' and unions' individual business.

Now, I think that the contractors whom I know to have signed that agreement did, in all instances, follow the recommendations of the committee. This was Kaiser Engineers, Blaw-Knox, Atkinson-Jones, and J. A. Jones. Now, there may well have been other firms that signed the contract; I didn't know as to this.

Q. But you don't know of any except the ones you mentioned while you were there?

A. I have not seen the signatures of any other companies other than those four.

Q. That is what I mean.

A. I have heard that there were other firms that did sign letters of intent, but I could not verify it myself.

Q. In other words, that would be, so far as your testimony here, that would be hearsay?

A. I believe so.

Q. Sure. Now, you sent a letter, as I gather it, of which [1035] this is a copy, and I am referring to Defendants' Exhibit No. 10, to both chapters, that is, the Builders Chapter and the Spokane Chapter. Would you examine that and tell me whether or not you are the author of that letter and whether

(Testimony of Kenneth M. McCaffree.)

you sent it to the parties indicated as addressees, both bottom and top?

A. Well, I sent the letter. I don't recall that I was entirely the only author of it.

Q. You sent the letter?

A. Yes, that is my signature.

Mr. DeGarmo: May I have the exhibit number, Mr. Etter?

Mr. Etter: Oh, 10, Mr. DeGarmo.

Q. You sent it as executive secretary of, I assume, the Hanford Contractors Negotiating Committee?

A. I believe the original carried the—well, the same heading as the other letter, the letter you had.

Q. I mean without having that, you were doing it—did you send it on authority of that committee?

A. I sent it on the letterhead of the committee.

Q. And with the authorization of the committee, or did you do it independently of the committee?

A. Well, I thought I was acting under the authorization of the committee. I was acting under the authorization of the committee. [1036]

Q. I see. Now, you say those bargaining rights which have been held by the Hanford Contractors Negotiating Committee on behalf of contractors working on the Hanford Project. Now, on March the 8th, what contractors working on the Hanford Project had signed the Hanford Agreement?

A. You mean the 1952 Hanford Agreement?

Q. No. As I understand, prior to this you had sent some type of a termination on December 29th.

(Testimony of Kenneth M. McCaffree.)

A. Yes.

Q. Now, when you sent this letter on March 8th, which contractor working for the A.E.C. on the Hanford Project, which contractor had signed, if any, the Hanford Agreement? In other words, which ones were you representing here that had signed the Hanford Agreement?

A. Well, to my knowledge, the only contractor on the Project on March 8th who I know to have signed the Hanford Works Agreement, in effect from 1952 through '55, was the J. A. Jones Construction Company.

Q. The J. A. Jones was a member of the Associated General Contractors, Spokane Chapter, at that time, were they not?

A. I do not know that that is true.

Q. Well, it has been so testified here, that the J. A. Jones became a member of A.G.C. in 1955. [1037]

A. I did not learn that until I was in this courtroom last week.

Q. So that when you sent this letter, you weren't representing any contractor that had signed the Hanford Agreement, were you?

A. I acted under the assumption and under the authority of the manager of the J. A. Jones Construction Company.

Q. I see.

A. As a representative of that Committee to do so.

Q. But assuming that the testimony here is

(Testimony of Kenneth M. McCaffree.)

correct, that J. A. Jones was a member of A.G.C. at the time you sent this letter, there was actually no member, no contractor, on the project with an A.E.C. contract who had signed the Hanford Agreement?

A. If I accept your assumption, the answer is correct.

Q. That is correct.

A. But I am not accepting your assumption.

Q. I see. Well, I say, assuming the testimony has been to that effect, you say that you didn't know it until you came into the courtroom and I assume that you heard it——

A. Yes.

Q. I see. You didn't know that at this time?

A. I did not.

Q. And at this time, you were representing, as I gather, only one, and that was J. A. Jones? [1038]

A. I don't know that I was representing only one. I think perhaps I shouldn't be using the "I" here; I think we ought to be using "we."

Q. The "we."

A. Let's clarify that it is the Hanford Contractors Negotiating Committee.

Q. All right, let's use that, then. Actually, then, the Committee was not representing anybody at this time that had signed the Hanford Agreement, were they?

A. I was acting under the assumption and the authority, so I believe even now, that I had the bargaining rights as a spokesman of the Hanford

(Testimony of Kenneth M. McCaffree.)

Contractors Negotiating Committee for the J. A. Jones Construction Company on March 8th.

Q. I see. Now, another thing on these contracts or these proposals that appear here as to—we'll take Exhibit No. 13 — Mr. Cochran, as I understand it, was a member of the negotiating committee, was he not? A. Yes, sir.

Q. And he was an employee and some representative of L. H. Hoffman?

A. He was the project manager.

Q. Project manager. Yet, L. H. Hoffman had never signed the agreement, had they?

A. I do not know. [1039]

Q. Well, you have never seen their signature?

A. That is right.

Q. And that is likewise true of the proposal that is marked and appears as Exhibit 14 with Mr. Cochran's name? It is the same Cochran, is it not?

A. Yes.

Q. And you have not seen any contract that he ever signed, at least, the Hanford Project contract?

A. There is no reason why I should see it, necessarily.

Q. I see. Now, at the time you sent the letter to Mr. Guess that is indicated here and marked as Exhibit No. 10, which you had here just a minute ago, I gather it was your intention on that date, on March the 8th, to assign only the bargaining rights of J. A. Jones, is that correct?

Mr. DeGarmo: I submit the document speaks for itself as to what he purported to do. It says "Any

(Testimony of Kenneth M. McCaffree.)

signers of the Hanford Works Agreement." If the J. A. Jones was the only one, then that is what he did, but the document speaks for itself.

The Court: Well, he may answer the question.

The Witness: Would you repeat the question, please?

Q. (By Mr. Etter): I asked you if, when you sent that letter, you were then under the impression that you [1040] were assigning only J. A. Jones' bargaining rights?

A. I was not under that impression.

Q. Well, what rights were you assigning?

A. I was assigning whatever rights the Hanford Contractors Negotiating Committee had on behalf of any contractors who became members of A.G.C. who had not previously authorized the A.G.C. to serve as their bargaining agent.

Q. In other words, you sent that with the intention of assigning at least the rights of all contractors as they had existed and been exercised for the years that you had been on the project?

A. And I think I also should note, you should note, that there were other associations involved other than the A.G.C. — the P.D.C.A., the Painters, Decorators, the Inland Empire Sheet Metal Association, all of whom would be involved in this, as well as the A.G.C.

Q. You were assigning all that to the A.G.C.?

A. No.

Q. I see.

(Testimony of Kenneth M. McCaffree.)

A. I was assigning only those bargaining rights which we could assign to A.G.C.

Q. Which ones were those now? Tell us again.

A. Well, the bargaining rights which the Hanford Contractors Negotiating Committee held were those [1041] rights of those contractors that had signed the Hanford Works Agreement.

Q. Well, then, that was only J. A. Jones, wasn't it?

A. To my knowledge, that was only J. A. Jones. There may well have been other contractors.

Q. Without your knowledge at that time, J. A. Jones was a member of A.G.C. and had been since 1955?

A. Would you restate that question, please?

Q. And at that time, without your knowledge, as I gather, but according to the testimony here, J. A. Jones had been a member of A.G.C. from 1955 to 1956?

A. I think it is a matter of fact, and perhaps I am reporting hearsay, the question of his membership in 1955 is now in doubt, it is not a fact in the mind of J. A. Jones Construction Company.

Q. What membership are you talking about?

A. In the Heavy Chapter in 1955.

Q. You say——

A. I perhaps should say I have no knowledge of this.

Q. You have no knowledge. I was merely asking if that has not been the testimony here?

A. I understand that it has been.

(Testimony of Kenneth M. McCaffree.)

Q. From Mr. Guess, the secretary?

A. Yes, that is correct.

The Court: Perhaps there is a little [1042] misunderstanding between the witness and counsel. What the testimony shows is not always the fact, necessarily.

Mr. Etter: That is true. That was the testimony, though, that is what I am asking you.

A. I didn't understand it that way. It was the testimony that Jones was a member in 1955.

Q. Now, as I gather, you were at a meeting, a joint meeting, on March the 8th, were you?

A. What kind of a meeting when?

Q. Was it a joint meeting of the A.G.C. committee and of you just prior to the time this letter was drafted? Were you present at a meeting where there was some verbal statement made that, "A.G.C. is now going to handle my bargaining rights, or the Hanford Contractors Committee's bargaining rights," or some such statement in that vein?

A. Well, there was a meeting between the representatives of the Teamsters and the representatives of the Hanford Contractors Negotiating Committee on March 8th. Is this the meeting you have in mind? I am not quite clear on it, frankly.

Q. Yes, I have that meeting in mind. Was there something said by either you or Mr. Guess to the labor representatives at that meeting?

A. Mr. Guess, to my recollection, was not present at that meeting. [1043]

Q. He was not present. Well, I am trying to

(Testimony of Kenneth M. McCaffree.)

determine whether or not you were at a meeting where the unions who were there were orally advised that A.G.C. would handle their negotiations and your committee's negotiations thereafter?

A. Well, I believe at the conclusion of that meeting, it was the oral expression of the spokesman, and I don't recall which—I believe Mr. Cochran was serving as the spokesman at that time—advised Mr. Sewell Davis that the bargaining rights which the committee had with respect to the negotiations or the practice that had been carried at Hanford were being given to the A.G.C. on the basis of contract or memberships in the A.G.C.

Q. I see.

A. A notation which I have is, the statement was made, "as of tomorrow," which would have been March 6th, "whatever bargaining rights the Hanford Contractors Negotiating Committee has held for Hanford contractors for negotiation with the Teamsters are hereby assigned to the A.G.C. on the basis of contractor memberships in those chapters.

Q. Was such a statement made, too, do you know, to the Operating Engineers at that meeting or a subsequent meeting that you attended?

A. Well, a letter, one of the exhibits here, was mailed to [1044] the Operating Engineers. Wasn't it Exhibit 10, that letter?

Q. That is correct, advising them of that fact?

A. Yes. I do not recall, but I believe I called Mr. Dunn or Mr. Rossman that same day and talked to them, but I can't at the moment be positive.

(Testimony of Kenneth M. McCaffree.)

Q. They were advised, however? A. Yes.

Q. Who, at that time, at that meeting that you are talking about when the oral statement was made that you have indicated to the Teamsters, what A.G.C. representatives were present?

A. Mr. Helvy of the Builders Chapter was present.

Q. I see. I think you said in your direct testimony that you were at the meeting representing J. A. Jones? A. Where?

Q. At this meeting, did you testify——

A. I did not testify that I was representing J. A. Jones on the meeting of March 8th.

Q. You testified that you were not?

A. That I was not. I was at that time acting——

Q. As Committee spokesman?

A. Executive secretary of the Hanford Contractors Negotiating Committee and serving as spokesman, at least part of that meeting. [1045]

Mr. Etter: That is all.

The Court: Any redirect?

Redirect Examination

By Mr. DeGarmo:

Q. Dr. McCaffree, you mentioned a matter of a work stoppage in 1954. Did that work stoppage result in some arbitration proceedings?

A. Well, the dispute in January, 1954, was actually with the Carpenters. Some would say it was partly over the question of isolation pay.

(Testimony of Kenneth M. McCaffree.)

Q. Was there in 1954 held an arbitration proceeding of some kind in which at least the defendant Teamsters Union was involved?

A. Yes, yes, in June of 1954.

Q. Do you recall who was present at that arbitration meeting representing the Teamsters Union?

A. I believe Mr. Joe Morrell was there, who was the secretary-treasurer of the Union preceding Mr. Davis, who preceded Mr. Lewis.

Q. At this meeting, and in the presence of Mr. Morrell, did the question arise as to who the Hanford Contractors Negotiating Committee acted for at Hanford Works?

A. As I recall, this was the first question which Mr. Bassett, who was the attorney for the Teamsters, asked [1046] Mr. Gordon Johns, who was the attorney for the Committee and represented the contractors.

Q. And was there a statement made in response to that question?

A. The statement made is identical with the one I have given here, is that the committee represented those contractors who were signatory to the Hanford Works Agreement.

Q. And that was in 1954?

A. That is correct.

Q. Now, reference has been made rather numerous times by Mr. Etter in his cross-examination of you to the fact that certain of the members of the Hanford Contractors Negotiating Committee held positions with some contractors who might have been

(Testimony of Kenneth M. McCaffree.)

doing work on the Project. I wish to ask you if on any of these documents which were shown to you there is any designation indicating that these people, either Mr. McReynolds, Mr. Garrett, Mr. Cochran, or Kenneth McCaffree, signed as a representative of their employer?

A. There is no indication that they so signed. It was the explicit statement on numerous occasions by spokesmen for the committee that the committee was there as individuals and, as such, did not represent the firms who happened to be their [1047] employer.

Q. I noticed he asked you about everybody except—did he ask you about Mr. Garrett, what was Mr. Garrett's position?

A. He was project superintendent for the Sound Engineering and Construction Company.

Q. For the Sound.

Mr. DeGarmo: I guess he did ask about Mr. Garrett.

Q. You say this was a matter which was mentioned on more than one occasion?

A. Oh, yes; on several occasions.

Q. At which meetings representatives of the Teamsters and Operating Engineers were present, or the Pasco-Kennewick Building Trades Council, at least, in which they were members?

A. Oh, yes; of that I am positive. I would need to consult the records to be sure, but I felt confident that even in Teamster and Operating Engineer meetings that statement had been made; that

(Testimony of Kenneth M. McCaffree.)

is, over the period, of course, from '53 through '55.

Mr. DeGarmo: I have no further questions.

Mr. Etter: None.

(Witness excused.)

Mr. DeGarmo: Call Mr. Bacon. [1048]

FRANCIS H. BACON

called and sworn as a witness on behalf of the plaintiff in rebuttal, was examined and testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Your name is Francis H. Bacon?

A. Yes, sir.

Q. And you are commonly referred to as Frank, rather than Francis?

A. That's right.

Q. Where do you reside, Mr. Bacon?

A. I live in Richland, Washington.

Q. And by what organization are you employed?

A. The Hanford Operations Office of the United States Atomic Energy Commission.

Q. For what period of time, Mr. Bacon, have you been employed by the Atomic Energy Commission in one capacity or another?

A. Oh, for about the last nine and a half, ten years.

Q. And during that last nine and a half or ten years, during what portion of that have you been situated at Richland, Washington?

(Testimony of Francis H. Bacon.)

A. During the entire period, sir. [1049]

Q. Will you state, Mr. Bacon, in some detail the various positions which you have occupied during this period of nine and a half or ten years with the Atomic Energy Commission at Richland, Washington?

A. I might preface that by saying that we have a very small staff compared to the amount of territory that we have to cover in observing the actions of all the contractors and all of their employees, so perhaps we do wear, necessarily, numerous hats. I will confine it to those that apply to this proceeding, perhaps.

My official capacity is deputy director of the organization of personnel division and, more particularly concerned with contractor personnel having to do with the obligations of the contracting agency of A.E.C. to delve into the wages and hours and working conditions of the various contractors on the project.

Q. Those would be the contractors holding contracts with the Atomic Energy Commission for construction work? A. That is right.

Q. In the course of your duties, have you also had occasion to become familiar with the organizational and operational management of the Atomic Energy Commission and the Hanford Works?

A. Yes, sir.

Q. And I think you stated that your present official office [1050] is deputy director of organization and personnel? A. That is right.

(Testimony of Francis H. Bacon.)

Q. Mr. Bacon, will you tell us first, for the record, somewhat of the geographical setup of the Hanford Works, that is, where is it located and is there an area outside of the barricade, is there a barricade, if so, what is a barricade? In other words, give us the picture for the record of what this Hanford Works Project is, geographically speaking.

A. It is an area comprising some 600,000 square miles and approximately the size of the state of Rhode Island. The Columbia River forms the northerly and easterly boundaries, the Yakima River the southern boundary, the Rattlesnake range of mountains the westerly boundary. It penetrates into Franklin, Grant counties, and it is primarily located in Benton County, and I think there was only 600 square miles, instead of 600,000.

Q. You got a few extra oughts on there.

A. Right.

Q. Is there a portion of this area which is commonly designated as Richland Community?

A. That is right, sir.

Q. And where is that located with respect to the entire area?

A. That comprises the city of Richland, which was formerly [1051] before the project a small village of about 240 people, and it is now expanded into the main living quarters for project employees comprising about 28,000 people. It is located at the southerly part of the project and, excepting for a small area which is utilized for administrative purposes, it is all open. What we mean, it isn't behind

(Testimony of Francis H. Bacon.)

any barricade, it is an open city. The barricade itself where the plants are located is north of the city of Richland and north of Camp Hanford and it is, just as the name implies, it is a barricaded area where certain security provisions apply and people must have security clearance to have access to that area.

Q. During the years 1955 and 1956, Mr. Bacon, were private vehicles permitted to drive into the area which was behind the barricade or through the barricade?

A. By properly security-cleared people, yes.

Q. And would that apply to members of the Operating Engineers and the Teamsters?

A. Yes, sir, who were employed on the job.

Q. Who had a reason to be there?

A. Yes, uh-huh.

Q. Mr. Bacon, by what agency or means are criminal laws enforced in the area, the area known as Hanford Works?

A. I would have to answer that that they are enforced by the county sheriff's office, either directly by the [1052] sheriff or his deputies or by deputies who are on the Project who have been deputized by the county sheriff.

Q. Are there persons upon the project, both in the Richland Community area and in the area behind the barricade, who are deputy sheriffs of Benton County?

A. That is right, sir.

Q. And of other counties?

A. Yes.

Q. In which part of the property lies?

(Testimony of Francis H. Bacon.)

A. Yes; I didn't intend to confine it entirely to the sheriff of Benton County.

Q. You didn't, you said, "sheriffs."

A. Yes.

Q. Now, these individuals, do they occupy any position other than as deputy sheriffs?

A. Yes; there is the plant guard forces in the plant itself and the village police force in the village of Richland.

Q. Is it true that certain of those individuals, or perhaps all of them—you can tell us—are both guards or police, depending on whether they are inside the area or outside, and at the same time deputy sheriffs?

A. They are at the same time deputy sheriffs, they are all deputized, yes, sir.

Q. They are all deputized. To what authority, Mr. Bacon, do [1053] these guards or policemen go in the enforcement of criminal law for instructions or for their authority?

A. The authority is entirely the county laws, codes, and regulations, speed limits, traffic regulations. I think I could go on and on and say even beyond the deputies themselves, the sanitary codes and the public health, and so forth, is subject to the same regulations as elsewhere in the counties.

Q. What difference, if any, Mr. Bacon, is there in the government's ownership of property in the area which is known as Hanford Community and that which is behind the barricade?

A. I wonder if I understood that correctly?

(Testimony of Francis H. Bacon.)

A. I am asking if there is any difference in the character of the government's ownership of property in the Hanford Community and that within the barricade?

A. There is to this extent, sir: The land itself is presently all owned by the government, the same both inside and outside the barricade on the project. However, outside the barricade, there are some stores and business districts and commercial facilities the buildings of which have been financed by private monies.

Q. Those are on properties which have been either leased or taken under concession from the government?

A. That is right. [1054]

Q. But is there any difference in the actual ownership by the government regardless of where the property is located other than as you have stated?

Mr. Carey: I think——

A. Until last week——

Mr. DeGarmo: Just a minute, there is an objection.

Mr. Carey: It seems to me that you are now examining the witness on the stand concerning land titles. I don't know that he is qualified.

Mr. DeGarmo: I will ask him some questions about his qualifications.

The Court: I think, so far as land ownership is concerned, probably the title evidence would be the best evidence, the documentary evidence.

Mr. DeGarmo: I think it is here in the requests

(Testimony of Francis H. Bacon.)

for admissions and admissions, so we don't need to go behind that.

Mr. Carey: Your Honor, I doubt if anybody here knows more about that than you do yourself as a matter of judicial notice. The legal proceeding by which this title was acquired was initiated before Judge Schwellenbach and I think your Honor concluded it.

The Court: Insofar as it has been concluded.

Mr. Carey: Yes. Then if your Honor [1055] doesn't know what the state of the title is, I doubt if a layman does.

Mr. DeGarmo: Maybe we will have a determination in this case, Mr. Carey, if you will bear with us a few minutes.

Q. (By Mr. DeGarmo): Mr. Bacon, are there within the area known as the Richland Community any courts, either Superior or justice?

A. There is a justice court there, yes, sir.

Q. Do you know in what manner the justice of the peace is selected or chosen?

A. I am afraid I don't know what manner any justice of the peace is chosen. I believe it is by the county supervisors, but he is operating as a part of the Benton County unit from Prosser.

Q. He actually has his office, however, and his court within Richland Community?

A. That is right, and the clerk.

Q. Mr. Bacon, from what source does the school system in Benton County derive its funds for the

(Testimony of Francis H. Bacon.)

support of a school system within Richland Community? A. (No response.)

Q. Perhaps I——

A. I believe I would have to answer that this way, that the Richland School District is School District No. 400, [1056] which is under the Washington State Department of Education, the same as other school districts are, and they receive their per capita from the state the same as other school districts do.

Q. Is there some arrangement, Mr. Bacon, by which the Atomic Energy Commission contributes toward the support of that particular school district?

A. Yes; they have contributed considerable funds to the school district, principally for expansion of the buildings and also to support, or supplement the support of the schools, the operation of the schools.

Q. Has that been by virtue of written contracts?

A. Yes, sir.

Mr. DeGarmo: Will you mark these as exhibits, please?

Mr. Carey: Is that the same——

Mr. DeGarmo: These are the same, these are the ones which I presented and which you have, I think, admitted existed but subject to some proof, perhaps. These are the same ones I presented to you in requests for admissions.

Mr. Carey: I think we admitted it.

Mr. DeGarmo: I think so, but on the same basis as some of the others, I think that it is easier to

(Testimony of Francis H. Bacon.)

refer to them as exhibits rather than attached to the requests [1057] for admissions.

The Clerk: Plaintiff's 17 and 18 for identification.

Mr. Etter: No objection.

Mr. DeGarmo: I wish to offer these two exhibits.

The Court: They will be admitted, then.

Mr. DeGarmo: 17 and 18, at this time.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibits Nos. 17 and 18.)

Mr. DeGarmo: I think those can be stapled together and given one single exhibit number.

The Clerk: All right, that will be the Plaintiff's 19.

Mr. DeGarmo: I am offering into evidence at this time, if your Honor please, a certified copy of an ordinance adopted by the Benton County Commissioners entitled:

"An ordinance relating to the licensing and operation of vehicles over and upon highways, streets, roads, alleys, parking areas, or other areas where vehicle traffic is permitted, within the Hanford Works, Benton County, Washington, and repealing ordinance of [1058] May 10, 1944, and an amendment to that ordinance dated June 6, 1955."

Mr. Etter: Are these the two copies of which——

Mr. DeGarmo: Yes, sir; I just gave you copies of them.

Mr. Etter: We have no objection.

(Testimony of Francis H. Bacon.)

Mr. DeGarmo: Certified copies.

The Court: 19 will be admitted, then.

(Whereupon, the said document was admitted in evidence as Plaintiff's Exhibit No. 19.)

Q. (By Mr. DeGarmo): Mr. Bacon, as a resident of Richland, Washington, do you vote?

A. Yes, sir.

Q. Has there been a time since when you took up residence at Richland when you have not been permitted to vote as a citizen of the State of Washington, to your knowledge?

A. No, sir; I don't believe I even had to wait. I had been a resident of the state before my moving there, so I had legal residence in the state.

Mr. DeGarmo: As I recall, Mr. Carey, I am testing my memory now, the contract on Workmen's Compensation I believe you admitted?

Mr. Carey: That is correct.

Mr. Etter: That is correct. [1059]

Mr. DeGarmo: So it is in the requests for admissions?

Mr. Etter: That is correct.

Q. (By Mr. DeGarmo): Mr. Bacon, are you familiar with the document that has been referred to throughout this trial as the Hanford Works Agreement?

A. I am quite familiar with it, yes, sir.

Q. And have you been so since its inception?

A. Yes, sir.

No. 16102

United States
Court of Appeals
for the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839, and INTERNA-
TIONAL UNION OF OPERATING EN-
GINEERS, LOCAL No. 370,

Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a
Corporation,

Appellee.

Transcript of Record
In Three Volumes

Volume III
(Pages 769 to 1158)

FILED

DEC 12 1958

PAUL P. O'BRIEN, C.

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division.

No. 16102

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Court of Appeals
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Southern Division.

(Testimony of Francis H. Bacon.)

Q. I am handing you that which has been marked as Plaintiff's Exhibit 6. Will you just examine it and see if that is the document which you understand and recognize as the Hanford Works Agreement?

A. That is.

Q. To your knowledge, Mr. Bacon, have there been any contractors performing work for the Atomic Energy Commission on the Hanford Works Project who have signed the Hanford Works Agreement?

A. This agreement, the 1952 agreement, to my knowledge, has been signed initially by Atkinson and Jones, joint venture, the Guy F. Atkinson Company, and J. A. Jones Construction Company; the Kaiser Engineers; Blaw-Knox Corporation, Chemical Division; and more recently in 1953, I believe, by the J. A. Jones Construction Company.

Q. During the period from 1952 to 1955, inclusive, will you [1060] state who were the principal prime contractors upon the Hanford Works?

A. Atkinson and Jones Company was just finishing up their contract in the early portion of 1952. The expansion program that followed was performed principally by Kaiser Engineers on the reactor expansion and Blaw-Knox Company on the separations expansion. At the conclusion of the Atkinson-Jones joint venture contract, a contract was entered into with the J. A. Jones Company as of May, 1953, to take over the portion of the former activity of Atkinson and Jones, generally referred to as minor construction.

(Testimony of Francis H. Bacon.)

Q. Well, are these the four contractors that you have named——

A. Those are the four, sir.

Q. ——who would have been the principal prime contractors? A. Right.

Q. And you know of your own knowledge that they signed the Hanford Works Agreement?

A. I have seen their signatures on it, yes.

Q. I want to call your attention, Mr. Bacon, to the provision of Article XI entitled “Subcontractors,” and Section 5 thereof, reading:

“The employer states that the Atomic Energy Commission has agreed to require that [1061] compliance with 8, 9, 10 and 18, Section 1, articles of this agreement, will be a contractual requirement in all of its construction contracts.”

And I wish to ask you, with respect to that paragraph of the Hanford Works Agreement, in what manner, if any, did the Atomic Energy Commission carry into effect that provision?

A. In explaining that, you will probably understand why that language of that provision was a little clumsy with the word “articles” after the enumerated articles. We would have to go back to some preliminary meetings early in the year 1952 between representatives of the Atomic Energy Commission and the Pasco-Kennewick Building Trades Council.

Q. Well, are those the meetings in which counsel on cross-examination referred to some conversation by Mr. Shaw?

(Testimony of Francis H. Bacon.)

A. That is right, sir. And to very briefly summarize what happened there, the Atomic Energy Commission was contemplating a further expansion program throughout the United States. There was some question as to whether any of that or part of it or how much of it would be done at Hanford. The labor situation had on some occasions been a bit unsatisfactory during the previous years, and our Washington people were questioning that point, very [1062] frankly. We had occasion to invite the Building and Construction Trades Department from Pasco to come in and talk to us about this contemplated expansion program, and there was a commitment made at that time, as I believe Mr. Knapp testified in this hearing—the fact is, as I remember, there were two commitments made at that time. I recall that Mr. Knapp had indicated to the Commission that if this program were given to Hanford, he assured us that he could go back and put his house in order. There were many of the local unions that had drifted out of the Pasco-Kennewick Building Trades Council, and his assurance to the Commission was that if we had a project agreement which embodied this further construction work, that he could assure the Atomic Energy Commission that he could present a pretty solid front of all of the unions that are normally operating in the construction industry. That was his commitment.

He then turned to the Atomic Energy Commission and asked if we, in turn, could guarantee that if they were able to consummate such an agreement,

(Testimony of Francis H. Bacon.)

labor agreement, that the Atomic Energy Commission would see to it that all construction contractors who came to perform work on that project would become signatory to such a Hanford Construction Agreement. [1063]

I believe it was Mr. Oscar Smith, of our Washington office who was present, that convinced Mr. Knapp that such a commitment would be legally impossible for a government agency to make, and in almost the same breath I believe Mr. Shaw indicated that if the unions would sit down with all the potential contractors and work out an understanding that would apply to Hanford where the conditions would be somewhat uniform and would include the representation of all of the unions that are normally engaged in building construction work, that he would see to it that it became a contractual obligation of construction contractors to pay the economic conditions that might result from such a labor agreement.

Consequently, when this agreement was negotiated, a blank space was left there in the completion of the agreement and then somebody went back through the agreement and picked up each of the articles that had a cost of monies item in it and added it in.

Q. That accounts for the fact that those are interlined, rather than being a part of the general typing of the document? A. That is right.

Q. Was there, after this Hanford Works Agreement had been negotiated, Mr. Bacon, adopted a

(Testimony of Francis H. Bacon.)

standard form of language which was included in the contracts of [1064] contractors with the Atomic Energy Commission on Hanford Works?

A. Yes; as a result of those commitments that were made, both by the unions and by Mr. Shaw, language was adopted to make it an obligation of construction contractors to pay these money items as were determined to be prevailing by the Commission.

Q. I am handing you Plaintiff's Exhibit 1 in this action, and calling your attention specifically to Article 32 entitled "Prevailing Wage Rates and Allowances," which appears on page 10 of that portion of the Exhibit which is entitled "Supplement to General Provisions, Standard Form 23a," and I will ask you to examine that and tell the Court whether there are any portions of that Paragraph 32 which, to you, are standard provisions in contracts during this period from the Hanford Works Agreement until the particular agreement which you hold in your hand?

A. Yes; I notice this is the agreement between the Atomic Energy Commission and the Morrison-Knudsen Company, and this particular provision, as I remember, is unique in one respect.

Mr. Etter: Is what? I didn't hear you.

A. Unique.

Mr. Etter: I see. [1065]

A. The language of that section of the contract is substantially identical with that which was included in all construction contracts after the ac-

(Testimony of Francis H. Bacon.)

ceptance of the Hanford Agreement by the contractors in 1952, excepting for the first five or six words that state that "During the life of the Hanford Works Agreement." That portion was added for the first time in this Morrison-Knudsen Company contract.

Q. And was there any other contract, to your knowledge, in which those words were included than the contract, Exhibit 1?

A. I am quite certain that there was none other. The reason I say that is this, that at the time we entered into this contract, we didn't know it was going to be Morrison-Knudsen. We knew that an invitation for bid was going out which included a contract form and we knew that the job which was being bid was going to run some eighteen or twenty months or two years, and we knew that the contractors at Hanford, as a result of demands from five or six of the unions to withdraw from the Hanford Project Agreement, that the contractors were seriously thinking of terminating that agreement at the end of its anniversary year, at the end of 1955. Consequently, with the termination of that Hanford Agreement, the Commission realized that its commitment [1066] to require a contractor to do something beyond that date would be unrealistic, so with the preparation of this invitation to bid, which later resulted in awarding the contract to Morrison-Knudsen, those words were added to the usual words of that section.

Q. Well, now, if we eliminate the words which

(Testimony of Francis H. Bacon.)

appear at the very first of this paragraph, "During the life of the Hanford Works Agreement," and start with the words, "The contractor agrees" and to the end of that paragraph, is that the standard clause which was in other contracts?

A. That was the standard clause in all contracts subsequent to, I think, about October, 1952, whenever this Hanford Works Agreement was completed.

As a matter of fact, I might add, sir, that there were no other contracts let for construction by the commission until after the termination of the Hanford Works Agreement other than the Morrison-Knudsen contract, and those subsequent contracts do not have that provision in. They merely rely on the contractor's obligation to pay not less than the minimum wages as determined by the Secretary of Labor and contained in his contract.

Mr. DeGarmo: You may examine.

Mr. Etter: Just a few questions. [1067]

Cross-Examination

By Mr. Etter:

Q. Now, Camp Hanford, I think you said, is north of the city of Richland?

A. Right. Camp Hanford occupies the area that was formerly North Richland.

Q. I see.

A. As the construction camp, yes.

Q. Is it within the barricade?

A. No; the camp itself is not.

(Testimony of Francis H. Bacon.)

Q. Is not. Well, now, Benton County doesn't apply its laws or statutes to Camp Hanford, do they?

A. Yes; as far as I know. I shouldn't testify on that.

Q. Well, I understood that is a military installation, is that correct, Camp Hanford?

A. It is my understanding that the military police work with the deputies.

Q. They work with them?

A. From Benton County, yes.

Q. It is not your contention that the deputy sheriffs handle the discipline or violations of Camp Hanford?

A. I'm afraid I wouldn't be able to testify. I am not qualified on that.

Q. Now, everybody that works inside the barrier must have [1068] security clearance inside the barrier?

A. Right.

Q. That security clearance, as I gather, is secured following such investigations as may be required by the regulations by the F.B.I.; am I correct?

A. Either the F.B.I. or the Civil Service Investigation Agency.

Q. Yes. Are there any taxes paid by residents within the city of Richland other than sales taxes?

A. Up until last Thursday, no.

Q. Up until last Thursday, no. In other words, there were no real property taxes assessed so far as you—well, maybe not you—real property taxes, isn't that correct, state taxes?

(Testimony of Francis H. Bacon.)

A. I think that you are thinking of real estate taxes.

Q. That is what I said. A. Yes. No.

Q. Yes?

A. Last Thursday, the first houses were sold to their prior tenants.

Q. That's right, but at this time there was nothing like that? A. Uh-huh.

Q. The sales tax was the only thing. The property, as you say, is owned by the government and there weren't taxes [1069] paid by residents of Richland, isn't that correct, on real property?

A. That's right.

Q. Yes. The deputies who work within the barrier, as you say, they have two jobs, they are deputies besides another job they may hold, is that correct? A. They are all deputized.

Q. Yes, but I mean do they have other employment other than that of a deputy sheriff?

A. Oh, absolutely, yes. They are guards or police.

Q. They are guards or police? A. Uh-huh.

Q. Who pays those guards and police inside the barrier?

A. Their salaries and wages are reimbursed by the Atomic Energy Commission through its cost-plus-fixed-fee contract with the operating contractor.

Q. That's right. And, likewise, that is so with respect to the police force in Richland, is it not?

A. At the present time, yes.

(Testimony of Francis H. Bacon.)

Q. At the present time. Now, there are public services other than that, the fire department, for instance, is that correct? A. Right.

Q. Who pays the salaries of the fire department?

A. Under the same contract. [1070]

Q. They are all reimbursable, are they not?

A. At the present time, yes.

Q. And is that true of all the public services, the same arrangement made for reimbursement as is made for police and deputy sheriffs?

A. If you refer to public services as the usual activities of a municipality, yes.

Q. That is correct, I am referring to it in that sense. They are paid under the reimbursable agreements, is that correct? A. Right.

Mr. Etter: That is all.

Mr. DeGarmo: I have no further questions, Mr. Bacon.

The Court: All right.

(Witness excused.)

Mr. DeGarmo: I would like at this time, merely for the purpose of convenience in connection with oral argument and consideration by the Court, to have marked as Exhibits—I think those can be marked as a single exhibit—these are the five letters from the Secretary of War which I have furnished to you and which you have admitted in the requests for admissions.

Mr. Carey: That is correct. The only suggestion I have is that the ones Mr. DeGarmo [1071] fur-

nished are rather illegible and I have some that are more readable and I will be glad to furnish them.

Mr. DeGarmo: I think these are fairly legible that I am offering. I kept out a good legible copy. Maybe I cheated you.

Mr. Carey: You did, but I already——

The Court: These are photostats.

The Clerk: These are all quite legible.

Mr. Carey: There will be no objection.

The Court: All right, Plaintiff's 20 will be admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit No. 20.)

Mr. DeGarmo: With the introduction of those documents, if your Honor please, the plaintiff rests its rebuttal.

The Court: Do you have any further testimony?

Mr. Etter: We have no surrebuttal.

The Court: Would you gentlemen like to argue this afternoon? The alternative is tomorrow afternoon. I have tomorrow morning taken up with motions. [1072]

* * *

(Whereupon, the trial in the instant cause was adjourned until 9:00 o'clock a.m., Wednesday, June 19, 1957.) [1074]

9:00 o'Clock A.M., Wednesday, June 19, 1958

(Whereupon, the trial of the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had:)

The Court: All right, proceed. [1075]

* * *

(Whereupon, oral arguments were made to the Court by counsel for the respective parties, after [1076] which the following oral decision was rendered by the Court:)

ORAL DECISION

The Court: When I was a boy, which was some years ago, it was quite the usual thing for boys to have pigeons and I had a pigeon loft, along with most of my friends, and one of the things I learned about pigeons was that the young squabs are heavier just before they leave the nest than they ever are again throughout their lifetime. I think a trial judge, in some respects, is a good deal like a squab pigeon. If a case is well tried, he is more heavily loaded with knowledge and recollection of the facts and even the law at the conclusion of the trial than he will ever be again, so that I do try, where it is possible, to decide cases immediately at the conclusion of the trial, although sometimes it is necessary to take them under advisement.

I think, switching metaphors abruptly, that a lawsuit, in some respects, reminds me of a bridge game. I am not an expert at bridge, but I do know that it is much more advantageous to be able to play out the hand on your first bid than on your secondary bid, and the Court in this instance has deprived the defendants of the privilege of playing out the hand on their original bid, which was that this contract

was not intended [1077] by the parties to apply to this job on the Hanford Reservation, and they have been obliged, and I have sympathized with their difficulties, to play their secondary bid, which I think appears to me to be pretty much of a 4-card suit.

The Court was under the impression, or at least one thing that influenced me in granting the motion to strike the affirmative defenses, was because I took the view that it wasn't a legal defense, and from what I have heard of the testimony here, I don't think that that conclusion would have been changed if I had heard all the evidence, and I was laboring under the delusion that it might shorten the trial if I granted the motion. As a matter of fact, I think it lengthened it, because I didn't properly appreciate the ingenuity of counsel in presenting this alternative defense.

The Court's position, as evidenced by the ruling on the motion to strike the affirmative defenses, is that there was a contract here, written contract, that by its terms applied to Benton County, and certainly that portion of the Hanford Reservation which lies within Benton County is geographically a part of Benton County, and the Court, rightly or wrongly, took the position that that contract had not been modified by parol evidence under the parol evidence rule. [1078]

Now, under that view of the situation, that means that there was a contract, and if there was a breach of it and the Court has jurisdiction under the applicable section of the Taft-Harley law, then, of

course, the plaintiff would maintain its action here and there would be liability on the part of the unions, unless the parties could show that by subsequent agreement of these parties the contract was not to apply to the Hanford Reservation or jobs on the Hanford Reservation or some other contract was made or some other contract adopted.

Now, certainly the burden, whether it is strictly affirmative defense—I think it is, and it has been pleaded as an affirmative defense—but certainly the burden would be upon the defendants to show that there was another contract and necessarily, under the proof here, a subsequent oral contract.

Now, what oral contract was there that superseded or modified or changed this written contract which the Court has held by its terms applied to all of Benton County? The only possible one that I can see here would be the oral contract made by the announcement of Mr. Knack at the afternoon meeting of January 5, 1956.

Now, it seems to me that for a court to [1079] hold, that under the circumstances there, with the background, and considering the relation of the parties and what they were doing, what they were attempting to do, it would be extremely unrealistic for a court to say that that was a contract to govern the terms and conditions of labor of these unions on a million, eight hundred thousand dollar construction job.

The statement wasn't even made in response to any question asked by any representative of these defendant unions. Mr. Knapp, who asked the ques-

tion, and it was, the evidence shows, almost an afterthought, the question was asked toward the close of the meeting after most of the discussion had terminated, Mr. Knapp, who doesn't represent either of these unions here, defendant unions, asked this question and got the answer in response. It doesn't seem to me that the Court could logically hold that these experienced business representatives of these unions, who certainly are capable, knew what they were doing, would rely upon a statement made in response to a question asked by somebody else, an oral statement made, as governing the terms and conditions of their members' work on this big contract. Certainly, they would have said, "Well, does that apply to my union? Will you give us a letter of confirmation on this so that we will be in accordance with the terms [1080] of the Taft-Hartley Act as to health and welfare payments and contributions?"

It just seems to me that the parties would not and, as a matter of fact, I think the situation is clearly here that they were not, relying upon that oral contract. They weren't there to make an oral contract; they weren't relying upon it. Their position was and has been that the written A.G.C. contract didn't apply to this job on the Hanford area. That is what the union members thought, that was their position, and that was counsel's position, and, unfortunately, the Court has taken a different view and deprived them of that defense.

Now, it logically follows, of course, that if there was no modifying contract, then this contract did

apply and was breached by the unions in failing to abide by the grievance procedures which were outlined in the contract.

I might just add this, and this is gratuitous, of course: A judge, after all, is only a sideline quarterback when it comes to conducting appeals to the higher courts and it is always easy and sometimes rather pleasureable to give advice if it doesn't entail any responsibility. It would seem to me that the questions, the real issues here, could be presented to the Court [1081] of Appeals—and this is the type of case that I think should be appealed and, as I have announced before, I have in mind putting everything in here in the findings and order that will determine the issues and make the findings in accordance with the requirements of Rule 54 so it will be a final order and will be appealable without awaiting the determination as to the amount of damages—but it seems to me that here is a case where it very well could be taken up on a short record that would present the two main issues here.

One is whether the Court erred in striking the affirmative defense and in precluding the defendants from offering evidence to show that this contract was not intended by the parties to apply to this locale and this job, and, two, the question, a substantial one, I think, and perhaps a close one, whether this plaintiff, who is not directly a signatory to the contract sued upon, may maintain the action under the Taft-Harley Act, and those questions do not depend upon the big record that would be made by all this testimony.

Of course, the defendants may very well wish to have the Appellate Court pass upon the secondary defense under the evidence here, but in my view their chances wouldn't be very good where the Court finds under this evidence that there was no oral contract and [1082] they would have to convince the Appellate Court that I am clearly erroneous in that respect. If I were a gambling man, I would take heavy odds on their prevailing on that score.

But that will be the Court's ruling then, and I assume that counsel will present proposed findings along the line of the Court's announcement here.

Mr. DeGarmo: We will, if your Honor [1083] please.

* * *

The Court: As far as Item 17 is concerned, it's stipulated between the parties that that amount is \$6,432.64?

Mr. Etter: That is right.

The Court: Okay.

Mr. DeGarmo: I would like to call Mr. Reed at this time.

RAMON E. REED

recalled as a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

By Mr. DeGarmo:

Q. Mr. Reed, you have testified briefly in this action, too, have you not? A. Yes, sir.

(Testimony of Ramon E. Reed.)

Q. Will you state for the purpose of identity what relationship you had to the Hanford Project?

A. I was project manager on that contract.

Q. And for what period of time were you the project manager, Mr. Reed?

A. December, 1955, to and including March of 1957.

Q. Now, since the previous trial of a portion of this case, have you been in other positions with the company?

A. Yes, as project manager on two contracts in California [1093] that we had with the Gas-Electric Company, and then in July I went to Brazil.

Q. And for what company are you presently employed in Brazil?

A. Companhia Constructoria Corinto.

Q. Does that company have a relationship to the plaintiff in this action, Morrison-Knudsen Company?

A. Yes; Morrison-Knudsen Company is one of the group of contractors that compose the company, the sponsor.

Q. And did you come from South America for the purpose of testifying at this trial?

A. Yes, sir.

Mr. DeGarmo: Can I have this marked as an exhibit, please, and here is an additional copy that you can hand to the Court?

(Whereupon, Plaintiff's Exhibit No. 21 was marked for identification.)

(Testimony of Ramon E. Reed.)

Q. (By Mr. DeGarmo): Mr. Reed, I am handing you that which has been marked as Plaintiff's Exhibit No. 21 for identification. Will you examine it and state what it is, if you know (hands paper to witness) ?

A. A construction schedule made out for a portion of the contract at Richland. It's for the 100-F area.

Q. Will you state, Mr. Reed, you say it is a construction schedule, it relates to the Hanford project, does it, [1094] a portion of it? A. Yes, sir.

Q. Will you tell the Court and counsel what are these numbers which appear on the left-hand side under the line "Item"?

A. That is the item number for each portion of the contract that we gave it for our books and for keeping the cost on that particular portion, and also for reference for the AEC to keep their records.

Q. By the way, was this particular portion of the work a lump sum bid or a unit price bid?

A. This was a lump sum.

Q. And does the lump sum for that particular portion of the work appear on this exhibit for identification? A. Yes, sir.

Q. What is the amount? A. \$908,380.

Q. All right. Now, what are the various items of work which appear under designation of "Component"?

A. That is a description of the various items of work involved in building this 100-F area portion of the contract.

(Testimony of Ramon E. Reed.)

Q. And how are the figures which are given under "Estimated Cost" in the third column, obtained?

A. They are obtained from our bid documents and also from [1095] the subcontracts.

Q. Do the total of the figures given in the third column amount to this \$908,380, which appears at the bottom of the column? A. Yes; they do.

Q. And, then, what are the figures which appear in the next column under "Weight of Percentage"?

A. That is the percentage that each item is with respect to the total amount of the dollar value of this portion of the contract.

Q. All right. Now, in the portion of the Exhibit for identification 21 which appears to the right of the column entitled "Weight of Percentage" appears certain months and figures. Can you tell us what those relate to and what purpose they have on the chart?

A. Well, that is the scheduling of the work, like, for instance, the excavation, the schedule to begin in the middle of December and be 100% complete by the middle of February.

Q. And do the figures that appear above the line represent the percentage as of a particular time?

A. Yes, that is the percentage we estimated that portion of that particular item would be complete at that time.

Q. Now, would a similar explanation apply to each of the other lines and figures shown on the right-hand portion [1096] of the exhibit?

(Testimony of Ramon E. Reed.)

A. Yes; it would.

Q. Now, there is a line which appears starting, or a graph line which appears starting at the approximate center of the page at the bottom and which runs to the upper right-hand corner, will you state what that line represents?

A. That is the accumulated progress of the job over a period of time. It's the percentage of work done each month added onto the previous month.

Q. Is that graph line obtained by graphing the other figures which appear on this sheet?

A. Yes.

The Court: That is according to the scale on the right-hand margin there, the bottom is zero and the top a hundred per cent, that is the way you figure it?

A. That is correct.

The Court: I see.

A. And, then, at the bottom is a line that gives you the percentage of the job that is to be complete each month.

Q. (By Mr. DeGarmo): Now, Mr. Reed, is this a schedule which was prepared prior to the commencement of the job or something which is prepared after the job commences? [1097]

A. It was prepared right after we started work.

Q. I note that in the lower portion of the Exhibit for identification appears the words "Approved for AEC" with the name of a Mr. Arndt underneath it. What relationship did this exhibit or chart have to the chart for the Atomic Energy Commission?

(Testimony of Ramon E. Reed.)

A. According to the chart we had to supply this document and AEC approved it. If they weren't in accord with the completion of the work——

The Court (Interposing): Did you have a definite completion date on your contract?

A. Yes; this is the one for 100-F and it was completed by October 1st.

Q. (By Mr. DeGarmo): 1956? A. 1956.

The Court: That was a provision of the contract?

A. Yes, sir.

Q. (By Mr. DeGarmo): All right. Now, what part in connection with payments which were to be received from the Atomic Energy Commission did this construction status chart which you have in front of you play?

A. Well, the way that percentages are used in figuring the estimate each month.

(Whereupon, Plaintiff's Exhibit No. 22 was marked for identification.) [1098]

The Court: Am I correct in assuming, Mr. Reed, that no penalties were imposed upon the plaintiff here for delay in completion?

Mr. DeGarmo: That is correct.

The Court: And your claim is for increased costs by reason of the delay?

Mr. DeGarmo: That is correct. We originally had an estimate, an item, as the testimony will bring out, for liquidated damages, but on completion of the job we had an extension of time which eliminated liquidated damages.

(Testimony of Ramon E. Reed.)

The Court: Then, your claim for damages is based upon actual delay?

Mr. DeGarmo: That is true. What I am proceeding upon now is to prove the amount of delay to which we are entitled by reason of the strike.

Q. Mr. Reed, I am now handing you Plaintiff's Exhibit No. 22 for identification and ask you to examine it and state what it is (shows paper to witness)?

A. This is the construction schedule and status chart for the 100-H area in which we had work at the Hanford Works.

Q. And was this portion of the contract also a lump sum contract? A. Yes; it was.

Q. And does the amount of the lump sum appear at the bottom [1099] of the third column?

A. Yes; it's \$868,800.

The Court: What is it that distinguishes these, is it the project number?

Mr. DeGarmo: Yes; up at the top, one of them is 100-F and the other one is 100-H, up at the top.

The Court: All right. Oh, I see. All right, go ahead.

Q. (By Mr. DeGarmo): And would your explanation as to the various items of the 100-H area chart, Plaintiff's Exhibit 22 for identification, and as to the method of makeup and handling and the purpose of it, be the same as you have already testified with respect to the 100-F?

A. That is correct. The item numbers have a

(Testimony of Ramon E. Reed.)

“two” preceding the item in the H area where it is “one” in the F area otherwise.

Q. The general setup is identical?

A. The general setup is the same.

Q. Now, Mr. Reed, I am sorry that I do not have enough of this next exhibit to give everybody one——

The Court (Interposing): I can use the original one, if you are short.

Mr. DeGarmo: Yes, this one I am, unfortunately, and I couldn't get a chance to get it photostated this [1100] morning. However, it is an intermediate exhibit and probably won't take too long.

(Whereupon, Plaintiff's Exhibit No. 23 was marked for identification.)

Mr. DeGarmo: Perhaps the Court could look at that one temporarily, while I am examining the witnesses as to this one.

The Court: All right.

Q. (By Mr. DeGarmo): Mr. Reed, having obtained the graph line which appears on Plaintiff's Exhibits 21 and 22 for identification, and the other information which there appears, did you, in company with other people from Morrison-Knudsen, make a schedule which showed schedule revenue as taken from these two identified exhibits?

A. Yes, sir.

Q. I am handing you now that which has been marked as Plaintiff's Exhibit No. 23 for identifica-

(Testimony of Ramon E. Reed.)

tion, and ask you to state what that exhibit is (shows paper to witness)?

A. This is the revenue tabulation showing scheduled revenue, actual revenue, and the revenue shortage.

The Court: Is that based on progress payments under the contract, is that correct?

A. The scheduled revenue is taken from these charts. [1101]

Q. (By Mr. DeGarmo): By "these charts" you are referring to 21 and 22 for identification?

A. Yes.

The Court: I suppose your revenue, as the job progressed, would be dependent upon the progress payments that were made under the contract, is that correct?

A. That is correct, which is in this second group, is the actual revenue.

Q. (By Mr. DeGarmo): The actual revenue is that which you actually received, is that correct, as shown by the books of the company?

A. That is correct.

Q. And the third column, which is at the right-hand side, which states "Revenue Shortage" is merely a mathematical deduction of the actual from the scheduled? A. That is correct.

Q. All right. Now, having obtained the figures which appear on Plaintiff's Exhibit 23 for identification, did you make some further use of them?

A. Yes.

(Testimony of Ramon E. Reed.)

Mr. Etter: Will you make these clear, do these refer to F, and that one to H?

Mr. DeGarmo: I am going to ask him a question on that to clear it up. (Q.) Mr. Reed, Mr. Etter has asked this question: On the first column under "Scheduled [1102] Revenue" appears certain figures. Now, what are those figures?

A. That is the total for the month of these two portions of the contract, 100-H plus 100-F.

Q. That would be the total revenue which you anticipated receiving according to the original production schedule?

A. That is correct, on these two items of the contract.

Q. And it is a combination of F and H?

A. That is correct.

Q. And the second one, is that a cumulative figure? A. Yes.

Q. In other words, each month you add the next one to it and then cumulate? A. Yes.

Mr. DeGarmo: Does that clear it up, Mr. Etter?

Mr. Etter: Yes.

Mr. DeGarmo: Will you mark this as an exhibit, please?

The Clerk: Marking Plaintiff's 24, your Honor.

(Whereupon, Plaintiff's Exhibit No. 24 was marked for identification.)

Mr. DeGarmo: Did I give you one for the Court?

The Clerk: No, sir.

Q. (By Mr. DeGarmo): I am handing you

(Testimony of Ramon E. Reed.)

now, Mr. Reed, [1103] a document which has been marked as Plaintiff's Exhibit 24 for identification. Will you examine it and state what it is, and also state what relationship it has to the Exhibits 21, 22 and 23 for identification (hands paper to witness) ?

A. This is a schedule and production chart for the portion of our contract in 190-F and 190-H areas. There is a line, a curve, showing the original scheduled revenue which is taken from, well, made up from these three exhibits and it is scheduled revenue shown on 23, is plotted in the first dotted curve.

Q. Now, let me see if we understand that, now. There is a line on this Exhibit 24 for identification which appears as the upper line and which is stated to be original scheduled revenue, is that correct?

A. That is correct; that is from the beginning of the work in December.

Q. Now, is that line the result of plotting on this chart the figures which appear on Plaintiff's Exhibit 23 as scheduled revenue?

A. That is correct.

Q. All right. Now, there is a lower line here that is entitled "Actual Revenue," from what source do you get the information to plot that line?

A. That is the actual revenue we received in accordance [1104] with our books and records.

Q. And do the figures which govern the plot of that line appear in Plaintiff's Exhibit 23 under the heading "Actual Revenue"?

A. Yes.

(Testimony of Ramon E. Reed.)

Q. Now, having made this chart, Mr. Reed, is it possible to determine from it the length of time behind schedule that this particular project was as to 100-F and 100-H areas at any given date during the period from the commencement of the job up until October 1st of 1956?

Mr. Carey: I think that is a matter for the Court to determine.

Mr. DeGarmo: Well, I think this witness is able to testify as to whether it is possible or not.

The Court: Well, his testimony will be controlling but I will simply take it as explanation of the document.

Mr. DeGarmo: And I am going to ask him to show how it is done.

The Court: Yes; all right.

A. Yes; it is.

Q. (By Mr. DeGarmo): Will you explain to the Court and to counsel, Mr. Reed, how you go about determining from this Exhibit 24 for identification what the actual progress is as to the contemplated or scheduled progress [1105] at any given date?

A. Well, the dotted lines showed the scheduled revenue, and the solid lines show the revenue actually received.

The Court: It would be just a matter of plotting on the graph the time difference between the two lines, wouldn't it?

A. Yes; just reading off between the two lines gives you the number of days behind schedule.

(Testimony of Ramon E. Reed.)

Q. (By Mr. DeGarmo): Now, what relationship does revenue have to progress under this type of arrangement that you had with the AEC, Mr. Reed?

A. Well, if you don't have any progress, why, there is just no revenue, if there is no work being performed there is no revenue being earned.

Q. Well, is there a direct relationship between progress and revenue? A. Very definite.

Q. Now, on Plaintiff's Exhibit 24 for identification, will you state what the difference was or how far behind the job was from scheduled progress as of March 22, 1956?

A. We were 18 days behind.

The Court: Wait a minute, I am not sure I got that date?

Mr. DeGarmo. That is March 22, which was the date [1106] the strike began.

The Court: Oh, I see, March 22, 1956; yes, all right.

Mr. DeGarmo: '56.

A. We were 18 days behind schedule.

Mr. DeGarmo: Will you mark this as an exhibit, please?

(Whereupon, Plaintiff's Exhibit No. 25 was marked for identification.)

The Clerk: Plaintiff's 25.

The Court: Let's see, March 22, wasn't it?

Mr. DeGarmo: Yes; 18 days behind at that time.

Q. As of September 30, 1956, Mr. Reed, how far

(Testimony of Ramon E. Reed.)

behind the scheduled progress was the job as of that date?

The Court: What is that last date?

Mr. DeGarmo: September 30, 1956.

The Court: Is that the completion date?

Mr. DeGarmo: No; that was not the completion date. I will explain in a minute why that date was selected.

The Court: All right.

A. We were 128 days behind schedule.

Q. (By Mr. DeGarmo): Now, is there some reason from the standpoint of the preparation of this graph that a date of September 30 or October 1st, 1956, was selected?

A. That is the date that we were back to the point that we [1107] were before the strike, that is, our work was progressing and it was going parallel to our original schedule, we were back where we figured it was on schedule.

Q. Well, now, you were still 128 days behind time, were you not? A. That is correct.

Q. But you, as of that time, your rate of progress and your schedule rate of progress were paralleling each other on the chart? A. Yes, sir.

Q. I am handing you what has been marked now as Plaintiff's Exhibit 25 for identification. Will you state what it is (hands paper to witness)?

A. This is a computation of the delay, number of days' delay, due to the Operating Engineers and Teamsters strike. On October 1st we were 128 days behind schedule. At the beginning of the strike we

(Testimony of Ramon E. Reed.)

were 18 days behind schedule, and so then at the end of the strike on June 6, there was a Carpenters and Laborers dispute which lasted twelve days, so 128 days minus 18 plus 12 gives the 98 days' total delay due to the Operating Engineers and Teamsters strike.

Q. Now, with respect to this stoppage or strike that you mentioned of the Carpenters and Laborers, will you state when that occurred with respect to the termination [1108] of the Teamsters and Operating Engineers strike which the evidence in this case has established terminated as of June 6, 1956?

A. That was right after the Operating Engineers and Teamsters strike, it was just a continuation.

The Court: The Carpenters and Laborers?

Mr. DeGarmo: And Laborers.

The Court: Oh.

Q. (By Mr. DeGarmo): And for what period of time did that strike of the Carpenters and the Laborers delay the resumption of work?

A. Twelve days.

Q. Now, other than the twelve days which was the actual period of the Carpenters and Laborers strike, what effect did that have upon the work after it was resumed that was not the same as the effect of the previous strike of the Operating Engineers and Teamsters?

A. It had no effect. I mean, we hadn't started up. It cost just as much to start up twelve days later as it would June 6th, it was just delaying the job twelve days.

(Testimony of Ramon E. Reed.)

Q. How many actual days had the job been down on account of the Teamsters and Operating Engineers strike? A. Seventy-six.

Mr. DeGarmo: At this time I now offer in evidence [1109] Plaintiff's Exhibits for identification 21, 22, 23, 24 and 25.

Mr. Etter: We have no objection.

Mr. Carey: Well, subject to cross-examination.

The Court: All right, they will be admitted, then, 21, 22, 23, 24 and 25 admitted in evidence.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits Nos. 21, 22, 23, 24 and 25, respectively.)

Mr. Carey: I didn't get 23. I guess you are short a copy.

Mr. DeGarmo: I will try and get some copies made. It's an intermediate exhibit. I will try and get some additional copies. I thought I had some copies.

Mr. Etter: They are offered for the ultimate claim?

Mr. DeGarmo: That is right.

Mr. Carey: May I inquire for my own information?

The Court: Yes.

Mr. Carey: These, as I understand it, have a relation to more than one of your items?

Mr. DeGarmo: They relate to all items, that is the determination, our determination, of the period

(Testimony of Ramon E. Reed.)

of time of delay directly related to the Operating Engineers and Teamsters strike.

Mr. Carey: That you claim has relation to more than [1110] one item in your bill of particulars?

Mr. DeGarmo: To all items.

The Court: All items due to delay other than the Carpenters strike?

Mr. DeGarmo: That is correct.

The Court: Is it your position, Mr. DeGarmo, that the schedule that was worked out at the beginning of this work would be some evidence of what the rate of progress would have been, although it isn't conclusive, of course, is it, if they can show that you wouldn't have got along, that just actually your schedule wouldn't be controlling?

Mr. DeGarmo: I think that is an accurate statement. We normally find that we can follow schedules but there are always circumstances that change that.

The Court: You didn't up to the time of the strike?

Mr. DeGarmo: We have given them the benefit of that and deducted it, as well as taking off the twelve days from the Carpenters strike.

The Court: Yes; I understand that.

Mr. DeGarmo: Will you mark this?

The Clerk: Plaintiff's Exhibit No. 26.

(Whereupon, Plaintiff's Exhibit No. 26 was marked for identification.)

Mr. DeGarmo: May the record show that I am

(Testimony of Ramon E. Reed.)

now interrogating the witness concerning Claim Item No. 1? [1111]

The Court: Yes, all right.

Mr. DeGarmo: And I call to counsels' attention that we have changed on this exhibit the payroll taxes and insurance rate to 5.65, instead of 10%, as it appeared upon your original exhibit.

Mr. Etter: That is Item 1?

The Court: I don't know that I should bring it up, the point of it might be cleared up without my questioning, but I just had this thought in mind, Mr. DeGarmo, these are both lump sum contracts on which you were paid the full amount of the contracts?

Mr. DeGarmo: Surely.

The Court: That is correct, aren't you claiming both increased costs and duplication of profits?

Mr. DeGarmo: That is correct.

The Court: Wouldn't your losses be the complete cost? Where would there be an additional lost profit?

Mr. DeGarmo: I think by reason of the delay, you may call it additional cost, but our costs were increased rather sizably by reason of the delay and, therefore, you don't recover just costs by getting the actual dollars, you have some other items.

The Court: Well, it's a matter of difference of classifications, I assume?

Mr. DeGarmo: That is right. [1112]

The Court: If you classify it all as increased

(Testimony of Ramon E. Reed.)

costs, it would be that and some of it you put in as lost profits?

Mr. Etter: We can agree on this item. As I understand, the claim is now made of \$13,389?

Mr. DeGarmo: That is correct, sir.

Mr. Etter: In comparison to the bill of particulars which indicated \$13,940.28?

Mr. DeGarmo: Yes, the difference was in the payroll tax and insurance. Your accountant thought we were wrong in using 10% and we have revised that figure to 5.65.

Mr. Etter: Well, we will agree to that.

The Court: This is supervisory personnel that had to be paid regardless of whether the job was going on or not?

Mr. DeGarmo: That is correct, retained on the payroll.

The Court: Oh, it's stipulated that Item 1, "Overhead Salaries During Strike Period," it is now stipulated the amount is \$13,389?

Mr. Etter: Correct.

Mr. DeGarmo: I then offer Plaintiff's Exhibit 26 for identification.

The Clerk: It's offered, Plaintiff's 26.

Mr. DeGarmo: Is that admitted?

The Court: That will be admitted, then, if it is [1113] stipulated it will be in here to show in the record. [1114]

* * *

The Court: Item 7, it's now down to \$896.01.

Mr. Carey: We will accept that.

(Testimony of Ramon E. Reed.)

The Court: All right, the record may show that that is accepted, then. Have you got an exhibit covering that?

Mr. DeGarmo: Yes, I am just putting that in. You will find that is identical except it's payroll taxes and insurance (shows paper to counsel Carey).

The Court: Item 28 can be admitted then, covering Item 7, showing \$896.01.

Mr. DeGarmo: I will just ask the witness a couple of questions.

Mr. Carey: Inasmuch as the item is admitted, I don't see any necessity of encumbering the record further. We are going to have an awful big record to print, anyway.

Mr. DeGarmo: Well, I have another reason to ask questions concerning this that relate to Item No. 16.

The Court: I see. Pardon me. I think as long as the exhibits are no more voluminous than this, I think it might be a good idea to put in your documents even if they [1124] are admitted because it makes a ready means of making computations for any tryer of the facts here.

Q. (By Mr. DeGarmo): Mr. Reed, with reference to Plaintiff's Exhibit 28, will you state, first whether after the strike had ceased, or perhaps I'd better phrase it, what efforts did you make after the strike had ceased, if any, to obtain the return to the project of the same employees who had been working for you before the strike?

(Testimony of Ramon E. Reed.)

A. Oh, we tried to get our previous employees back.

Q. Now, why did you try to get them back?

A. They were experienced in our methods, the forms that we were using, which were special forms, and the foreman and the men had just got to where they were working as a team previous to the strike. We wanted that same group of individuals returned to the job.

Mr. Carey: Your Honor, you are talking about Item 7 now?

Mr. DeGarmo: Yes, Item 7.

Mr. Carey: Well, we admit we are entitled to something on Item 7. We don't seem to be very far apart.

The Court: Maybe I am confused, I thought you had stipulated on Item 7 on the amount of \$896.01. I think Mr. DeGarmo was examining further because it was in reference to some other item. [1125]

Mr. Etter: Mr. DeGarmo says this has reference to Item 16, which is the deficiency loss.

Mr. DeGarmo: Explanation of this exhibit is necessary in order to bear on Item 16.

The Court: You were not able to get the same ones back?

Q. (By Mr. DeGarmo): Now, what did you find with reference to the strike as to the ability of these men which you tried to obtain who had worked for you previously?

A. We found that the best carpenter foreman

(Testimony of Ramon E. Reed.)

was not available and that the majority of our best carpenters had found jobs elsewhere and the carpenters that we got back, the first ones we got back, were a poor group of carpenters, as a rule.

Q. In explanation further, Mr. Reed, of this Exhibit No. 28, I notice in the right-hand column it refers to "Process Time," will you state what that has to do with process time?

A. That is the time that was required for a man to come to our office to get his application form. It's a General Electric or AEC form made out, taken to the GE, get it turned in and get his physical examination if one was required. It's the time required to hire a person to work on a project. [1126]

Q. Under the arrangements with the Union did you pay them a salary during this clearance period?

A. Oh, yes, they were paid from the time they came to the office.

Q. Now, you have mentioned that you lost two carpenter foremen. Do their names appear in the first column under "Terminated due to Strike"?

A. Yes.

Q. Will you identify them for us?

A. Yes, J. Cox and R. Young.

Q. And who were hired to take their place?

A. N. Williams and J. Boltman.

Q. Now, there shows on this Exhibit 28 the name of a Mr. Hooper, as being hired. What was the purpose or reason why he was hired?

A. Mr. Hooper was hired because he was hired to be superintendent of the 100-H area where Mr.

(Testimony of Ramon E. Reed.)

Beam had worked previous to the strike and was not available at the time of termination of the strike because he had been transferred to another job down in Oregon.

Mr. DeGarmo: May the record show that this testimony has to do with Item No. 8 of the claim?

The Court: All right.

The Clerk: Marking Plaintiff's 29.

Mr. Carey: For your Honor's information, there is [1127] going to be a big dispute about that item.

(Whereupon, Plaintiff's Exhibit No. 29 was marked for identification.)

The Court: Well, I assumed there would be some dispute about the efficiency loss.

Mr. Etter: There is a big dispute about that.

Mr. DeGarmo: That is one we are ready to meet.

The Court: Well, all right.

Mr. DeGarmo: I had better try real hard. This is 29, during the period of the strike, that is right. I might state to counsel that there is a change on the second sheet of this exhibit over the one which you have previously seen again brought about by the examination made by the accountant. It occurs on one item which still appears uniform, concrete form panel. It was pointed out that a certain portion of the form panels which had originally been showed here had been used as a part of the cost of the materials in Item No. 16 and, accordingly, as the evidence will bring out, that has been eliminated; and then there was an item on here of rental, which was

(Testimony of Ramon E. Reed.)

also in the same category, and that was eliminated entirely. With those two changes the exhibit is as originally presented, but the amount has been fixed.

Q. Mr. Reed, I am handing you now a document which has been marked Plaintiff's Exhibit 29 for identification, [1128] will you examine it and state what it is (shows paper to witness)?

A. This is entitled "Equipment Rental" of equipment at the job site and it gives the description of the equipment, number of units at the job site, source of rate, of the rental rate, and rate per unit per month, and rental per month, for the total number of units, and there are two columns, one rental for three months period, and one rental for a two months period.

The Court: This is on equipment that stood idle during the strike period and belonged to the plaintiff, is that right?

Mr. DeGarmo: That is correct.

The Court: And you claim the rental? I see, all right.

Q. (By Mr. DeGarmo): Now, Mr. Reed, let's go back on this exhibit; will you refer first to the left-hand column under "Description" and state from what source the information there shown was obtained?

A. This was obtained from our equipment records.

Q. Well, do you maintain equipment records of each item of equipment on the job? A. Yes.

(Testimony of Ramon E. Reed.)

Q. And then the second column is number of units, what does that indicate? [1129]

A. That is the number of pieces of a particular piece of equipment that was on the job.

Q. And then, under "Source of Rate" appears two types of letters, one is AGC, and one AED. Will you explain to the Court and counsel what those two categories mean, AGC first?

A. That is the Associated General Contractors.

The Court: That is their rental schedule?

A. Rental schedule.

The Court: And what is AED?

A. That is Associated Equipment Dealers rental schedule.

Q. (By Mr. DeGarmo): Will you state what use is made in the construction industry of those two equipment rental schedules?

A. Well, they are more or less a Bible for rental rates.

Q. Now, can you tell us why in the instance of the pickups and the automotive equipment you use AGC rates, whereas, in I think all other instances, AED are used?

A. I don't believe AED covered the rental rate for those pieces of equipment.

Q. Are the rental rates published in manual form that we are talking about, Mr. Reed?

A. Yes, they are. I believe those manuals come out yearly.

The Court: I assume that if an owner rented under these rates he would get a fair profit in ad-

(Testimony of Ramon E. Reed.)

dition to his [1130] cost, wouldn't he? These rates are designed to cover every item of cost on the equipment, plus a fair profit to the owner?

Mr. DeGarmo: Well, I think Mr. Reed can answer that. I don't believe that is accurate, but let him answer.

A. The AGC does not include profit.

The Court: I was just trying to inquire here, I don't know, but I wondered whether these were the rates at which equipment was to be rented, or the cost basis for those who owned it?

A. The depreciation and that is all, this is just bare rental rates.

The Court: I see. If you had a job, then, you couldn't rent equipment at this rate from an owner?

A. Yes, this would be the rate you would rent.

The Court: Well, then the owner must get a fair profit or he wouldn't rent it?

A. I don't believe that AGC rate included profit.

Mr. DeGarmo: I think that only the AGC does not include profit, and AED does. We recognize that.

The Court: All right.

Q. (By Mr. DeGarmo): Then, those two equipment rental schedules are the source from which you obtained the per unit rental which is shown in the fourth column, is that correct? [1131]

A. That is correct.

Q. And then, the rental per month is the multiplication of the number of units times the unit rate per month?

(Testimony of Ramon E. Reed.)

A. And the unit rate per month gives you the rental per month.

Q. All right. Now, on this schedule on Plaintiff's Exhibit 29 for identification appears a column headed "Rental for Three Months Period," will you state what is listed under the three months period?

A. The equipment that was on the project during the entire length of the strike and when this was made out we estimated that the strike would last about three months.

Q. Was this one of the exhibits which was made out early in the litigation?

A. Yes, it was.

Q. And has there been any change in the first sheet of it?

A. There has been no change in the first sheet, no, sir.

Q. Then, in the next column to it appears "Rental Equipment on Job Two Months." Will you state what that indicates?

A. That indicates the equipment that after the strike was in progress for two months, the equipment was moved to another contract.

Q. Then there was some of the equipment that was moved off of this job?

A. Yes, sir. there was. There was this list of equipment [1132] here.

Q. And do the dates that the equipment was moved off show in the next column?

A. Yes, they do.

(Testimony of Ramon E. Reed.)

Q. And then there is a final column here in which appear, I believe, on the same two figures opposite, "M.C. 414, Lorrane Motor Crane and Dragline Bucket," will you tell us what is the reason for the inclusion of those two items?

A. That piece of equipment was on the way to the job when the strike started and it was never used on the job, never used on this contract. It laid there two months and was moved out again to another contract.

Q. Well, now, what does this 4288.13 and 482.04 represent?

A. That is the cost of moving the equipment from where we got it to the job, to the job site.

Q. When equipment is moved off a job, one of the M-K jobs, Mr. Reed, to another M-K job, which one of the jobs stands the move-out cost?

A. The job that is receiving the equipment pays to have it moved to the job.

Q. And this particular piece of equipment when it was moved off the job, the move-out cost was paid by the contract to which it went?

A. The contract to which it was [1133] dispatched.

Q. What was the reason that this equipment was not used on this job?

A. We were not working during the first two months of the strike and there was no work in progress.

Q. Will you refer now to the second sheet, I want to point your attention to one item in the first

(Testimony of Ramon E. Reed.)

column, "Uniform Concrete Form Panels," will you state what those were and what use was made of them?

A. That is a patented form panel consisting of an angle iron framed around the outside, and a plywood facing constructed of pieces two feet wide by various lengths long, and this is the square footage that was actually owned by the company and on the job at this time.

Q. All right. Now, does this exhibit represent the total amount of the claim that was made on account of equipment rental or the ownership of the equipment during the period of the strike and the delay occasioned by the strike?

A. Yes, I believe it does.

Q. You have already stated that this was on a 90 day basis whereas I think some of the other items are on a 98 day basis, is that right?

A. Yes, this is made out before additional computations and additional study of the job and has not been changed. [1134]

Q. If the claim was presented on a 98 day basis, it would increase this?

A. It would increase the cost.

Q. I don't know whether you made that computation or not. Did you make a computation to determine? A. No, sir.

Mr. DeGarmo: You didn't make it? Somebody did, I will introduce that later. I will offer Plaintiff's Exhibit No. 29 at this time. I guess this is the identified exhibit here.

(Testimony of Ramon E. Reed.)

The Clerk: Let me have that other exhibit over there, too, will you, please?

The Court: If there is no objection, it will be admitted, then.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 29.)

Mr. DeGarmo: For the purpose of the record, this testimony has to do with what was originally in Item No. 9.

Q. Mr. Reed, in the damage claim originally instituted on behalf of Morrison-Knudsen Company, there was an item for liquidated damages, will you state what happened with respect to that item?

A. At the termination of the contract we are not charged liquidated damages for any delays that occurred. We [1135] were all relieved of that, the work was on schedule, there was enough delays caused by the owner to compensate for any delay that occurred.

Q. Then, at this time there is no claim being asserted for liquidated damages, is that correct?

A. No, sir.

Q. All right, let us next, then, for the purpose of the record, turn to Item No. 12, which has to do with general administrative expenses.

The Clerk: Plaintiff's 30.

(Whereupon, Plaintiff's Exhibit No. 30 was marked for identification.)

Q. (By Mr. DeGarmo): First, Mr. Reed, will

(Testimony of Ramon E. Reed.)

you state what is covered or contemplated by "General Administrative Expense"?

A. That is the expense of our home office at Boise and the district office and the home office expense. The job is charged a certain percentage of the revenue to cover the expenses of those offices.

Q. Will you state then, Mr. Reed, what services are performed or furnished by the home office and by the district office with respect to a project such as the Hanford Project?

A. Well, the home office handles company insurance, safety, labor relations and negotiations, financing, [1136] and it covers the expense of, oh, the president and various officers of the company that carry on business for company operations, and then, also, this percentage also goes to the district office to cover the district manager and the people who supervise the contracts within the district in which the district office does their bidding, carrying on new business, and so forth. It covers all cost of the district office.

Q. Then, the expense which the job itself has under its administrative overhead expense is the direct expense?

A. That is all, it's all charged directly to the job.

Q. It does not cover these things which you are now mentioning?

A. No.

Q. Now, will you refer to Plaintiff's Exhibit No. 30, or Plaintiff's 30 for identification, and will you explain, first, just generally, what the exhibit is?

A. Well, the title is "General Administrative

(Testimony of Ramon E. Reed.)

Expense'' and this is a determination of the administrative expense chargeable during strike.

Q. Now, upon what theory or basis is this exhibit prepared, Mr. Reed?

A. We have taken for April the number of days in April and the original scheduled revenue for that month and the same with May and June, and then added the total [1137] number of days for those three months and the 91 days the original scheduled revenue was \$702,380. The actual revenue which was the only month that we received revenue, was \$104,972, and the net revenue short was the difference between the 702 and the 104, or \$597,608. And then that divided by the 91 days in the three months gives us a net revenue short per day of \$6,550, and then the revenue, administrative expense revenue short for the period of 98 days was multiplied by 3%, which is the percentage the job is charged for general administrative expense, which amounts to \$19,257.

Q. Where does the 3% come from, Mr. Reed, if you know?

A. That is the percentage that the home office charges all contracts for the entire revenue on the job. That is charged on extra work as well as the original contract amounts.

Q. Mr. Reed, is this amount which is shown by this exhibit to cover the period of the actual strike or the period that the work was extended by reason of the strike?

A. This covers the period that the—wait a min-

(Testimony of Ramon E. Reed.)

ute—it cover the administrative expense that was lost due to the strike.

Q. During the 98 day period?

A. For the 98 day period. [1138]

* * *

(Whereupon, Plaintiff's Exhibit No. 31 was marked for identification.)

The Clerk: Plaintiff's 31.

Mr. DeGarmo: May the record show that on Plaintiff's [1139] Exhibit No. 31 for identification the testimony of the witness will now refer to Claim Item No. 13?

Mr. Etter: We haven't any objection on that item, have we, Mr. Carey?

Mr. Carey: No.

The Court: Well, all right. It is stipulated, then, that Item 13 is \$675.75?

Mr. Carey: That is right.

Mr. DeGarmo: I do have a few questions of testimony that I want concerning this item which relate, again, to the other item, Exhibit 16.

The Clerk: It will be admitted then, your Honor?

The Court: Yes, it will be admitted.

The Clerk: That is 31.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 31.)

The Court: Just to make the record complete, now.

Q. (By Mr. DeGarmo): Mr. Reed, you have al-

(Testimony of Ramon E. Reed.)

ready testified that as a result of the strike that as of October 1st or September 30 of 1956, this project was behind approximately 98 days. Did your completion dates still face you under this contract at that time?

A. Yes, they did; you mean at the end of the strike?

Q. At the end of the strike. [1140]

A. Yes, they did.

Q. Now, after the strike had ceased and you were able to resume operations, what efforts did you make in order to try and pick back up to the same, just where you were before the strike, as far as production was concerned?

A. Well, we had to change our scheme of operation. We intended, our plans were, to use these patented forms in the F area and then in the F area to move from the F to the H area, and then that way we would reduce our costs of the material that would be required, lumber and form material, and also we would have experienced men throughout the job working with us on that type of form.

Q. Now, I am showing you Plaintiff's Exhibit 31 for identification which has reference to certain extra strength concrete. Will you state why some extra strength cement, I think it should read, rather than "concrete" was used after the strike ended?

A. The AEC permitted us and also we purchased our concrete from AEC and they designed this extra strength concrete for us in order to reduce our concrete form stripping time.

(Testimony of Ramon E. Reed.)

Q. And to what extent did the use of this extra strength concrete reduce your form stripping [1141] time?

A. Well, on various items it varies. I remember on beams, certain beams and girders, it reduced it from 21 days to 13 days. On equipment foundations it reduced it from 48 hour stripping to 40 hours.

Q. Well, then, what effect upon your ability to progress did the use of extra strength concrete have?

A. Well, it let us release those forms so that we could move ahead and increase our rate of production.

The Court: I think I announced that 31 would be admitted?

The Clerk: Yes, your Honor, you did.

Mr. DeGarmo: Will you mark this for identification, please?

The Clerk: Plaintiff's 32.

(Whereupon, Plaintiff's Exhibit No. 32 was marked for identification.)

Mr. DeGarmo: May the record show that the testimony of the witness will now relate to Item No. 14.

Mr. Etter: I don't think we have any dispute on that, did we, Mr. Carey?

Mr. Carey: No, we agree to that.

Mr. DeGarmo: This has been slightly reduced over the figure that you have, \$565; I assume you don't object to it?

(Testimony of Ramon E. Reed.)

Mr. Etter: Not a bit. [1142]

Mr. Carey: We still agree.

The Court: 2288? The figure is \$2,284.49? And it is stipulated that that is the amount of this item?

Mr. Carey: That is correct.

Mr. DeGarmo: I then offer in evidence Plaintiff's Exhibit No. 32, which is the tabulation of the effect of the wage increase.

The Court: Yes, all right, and 32 will be admitted to complete the record.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 32.)

The Clerk: Marking Plaintiff's 33.

(Whereupon, Plaintiff's Exhibit No. 33 was marked for identification.)

The Court: On Item 16 again?

Mr. DeGarmo: Yes, I am skipping Item 15 temporarily at this time. We had an exhibit that had to be retyped and it will be ready after lunch. This testimony of the witness will now relate to Item No. 16.

The Court: Yes, all right.

Q. (By Mr. DeGarmo): Mr. Reed, as an item of contract work will you state whether the concrete work on this project was a major or a minor part of the work?

A. It was a major part of the work.

Q. For the record, will you tell the Court what

(Testimony of Ramon E. Reed.)

the nature [1143] of the concrete work was that was performed on these two projects, 100-F and 100-H?

A. Well, it consisted of a slab underground down about ten feet and floor slabs and foundations for heavy pump foundations, and then above that there is that exterior building foundation, the foundation for the building over the pumps and then the heavy concrete pump foundations, and then there is a floor slab consisting of girders and reinforced concrete girders and beams around the pump foundations.

Q. In connection with the concrete work that you have described, what is involved other than labor; in other words, what equipment or materials are involved?

A. Oh, you have reinforcing steel to install, and you have form work to build, and you either use patent forms or built up forms. Now, we planned on using the patent form in this construction, but due to the strike and the increased, the fact that we had the step-up for progress after the strike, caused us to build the form panels on the job out of shiplap plywood.

Q. Now, you mentioned the nature of the concrete work, was this identical on F and H on the two buildings?

A. No, sir, they were not 100% identical but they were similar in nature but not definitely identical.

Q. Well, was there one of the structures which required [1144] more forming than the other?

A. Yes, I believe F area required more form per square feet than the H area.

(Testimony of Ramon E. Reed.)

Q. Now, will you state what your, I think you have covered this, in part——

A. More forms per cubic yard, pardon me.

Q. I think you have stated this, in part, but in order to have it relating to this particular item, will you state what your contemplated method of procedure was as to 100-F area and 100-H area prior to the strike and the one you were following at the time the strike occurred?

A. Well, our plans were to build up our personnel in the F area and put the foundation, that is, the footers on the ground in F, and maybe get that job going, and then pull personnel from that F area into the H area. The H area excavation was started after the F area excavation was completed. We were going to bring all the personnel into F and then move them into H as we needed them and they would be more or less trained with our methods and our foremen, and so forth, our supervision.

Q. What was the completion date, the scheduled completion date, for the 100-F area?

A. October 1st. [1145]

Q. And what was the scheduled completion date for the 100-H area?

A. December, 1956.

Q. All right. Now, after the strike had occurred and you were able to resume work, what changes, if any, did you make in your construction plans?

A. Well, we were behind schedule and the AEC was after us constantly to pick up, to bring the job up to production as soon as possible, and we saw right off that it wasn't possible to wait until the

(Testimony of Ramon E. Reed.)

forms became available in the F area to move to the H area for use over there, so the forms for all the pump foundations in the H area were job-built panels and we used the patent forms in the F area.

Q. Mr. Reed, when a job is commenced, or if a job is shut down and then recommenced with new personnel, what is the result as far as the rate of progress and efficiency is concerned?

A. Well, in starting up a job it takes several days for new men. They may be experts in their craft, but it takes several days for these men to get to working as a unit; they don't know their foremen and they don't know their superintendents and engineers, and so forth, so it takes a number of days for them to get to working as a unit, similar to an All-American football [1146] team, or any group of experts that get going, it takes some time to work together and form a championship team, so to speak.

Q. Now, does the Morrison-Knudsen Company on a project such as the Hanford project, keep a record of costs of concrete pouring and of the materials which go into the production of concrete?

A. Yes, we do.

Q. I am handing you Plaintiff's Exhibit No. 33 for identification. Now, without going into the several items, will you state generally what this exhibit is (hands paper to witness)?

A. That is a computation of the efficiency loss for labor and supplies.

Q. It's divided into labor and supplies?

(Testimony of Ramon E. Reed.)

A. Yes, there are two pages, one covering labor and one covering the supplies.

Q. And is it the first page which covers the labor costs?

A. Yes, the first page covers labor, excess labor.

Q. Referring, Mr. Reed, to this exhibit for identification No. 33, and to the first item "Labor Costs to March 31, 1956," I wish to ask you from what source that information was obtained?

A. That was obtained from the book cost.

Q. And then there is also a similar item "Labor Cost to [1147] September 30, 1956," from what source would that be obtained?

A. That would be the same, from the book cost.

Q. Then, in the preparation of this exhibit will you tell what was done in order to determine what, if any, excess cost there was from a labor standpoint in the pouring of concrete after the strike, as contrasted with what you had experienced prior to the strike; just explain the computation that appears there, the method of it, not the figures?

A. Well, the cost of labor, labor cost, prior to the strike is divided by the number of cubic yards and that gives you the cost per cubic yard of concrete up to March 31, and the same is done for the period from June 6 to September 30, and then the difference is the excess cost of labor per cubic yard after the strike; this is all labor, there is no material or anything in it.

Q. And what was found from this computation as

(Testimony of Ramon E. Reed.)

to the cost of the labor of concrete in the 100-F area before the strike and after the strike?

A. Well, it showed that there was a difference of \$11.30 per cubic yard greater after the strike than previous to the strike.

Q. What was the reason, Mr. Reed, other than those that you have already stated, why this difference occurred, if [1148] you know?

A. Well, it was due to the people getting used to each other and also the increased pressure that the AEC was putting on us to get back to schedule. We had to put on more people, more green hands, and the fact that the labor that we got wasn't as good as the labor that we had previous to the strike, the Carpenters.

The Court: There wasn't any penalty put on here, as I understand it, for delay in completion of the contract? Could you tell me at what stage of the work that became known to the plaintiff that it would not have to meet the completion schedule?

Mr. DeGarmo: At the end of the contract.

The Court: At the end?

Mr. DeGarmo: I have the proof here. [1149]

* * *

February 24, 1958—2:00 o'Clock P.M.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit:)

RAMON E. REED

recalled as a witness on behalf of the plaintiff, resumed the stand and testified further, as follows:

Direct Examination

(Continued)

By Mr. DeGarmo:

Q. Mr. Reed, prior to lunch I think you had just explained from Plaintiff's Exhibit 33 for identification the computation relative to labor which appears on Page 1 of the exhibit and with reference to the 100-F area, will you state whether the same method of computation was used with respect to the 100-H area insofar as it pertains to labor cost?

A. Yes, it was the same method, identically.

Q. Mr. Reed, if concrete forms are left unattended and unused for an extended period of time, we will say 30 days or over, what effect does that have upon their reusability?

A. If the forms are in place, constructed in place, it's [1151] easy to warp out of line, out of grade, and dry up. Some of these were narrow wall forms which we were not able to re-oil before we placed the concrete. It was difficult to strip and difficult to remove our form ties, and the lumber that was left piled out in the area had warped and much of it to the point where we couldn't use it again.

Q. Now, will you refer to the second page of Exhibit 33 for identification and tell us, first, just generally, what is the information which is given on this sheet?

(Testimony of Ramon E. Reed.)

A. This is the computation, the extra cost of material required due to the strike.

Q. First referring to the 100-F area which appears at the top of the exhibit, will you state from what source was obtained the figure of \$21,866.53 as the form rental and supplies?

A. That is taken from our books. Those are panels, form panels.

Q. Do you keep as a part of your records the costs of various items which go into the concrete work?

A. Yes.

Q. And then next appears "Lumber Prefabrication Forms," what does that have reference to?

A. That has reference to lumber that was used in prefabricated forms, the forms were prefabricated on the job. [1152]

Q. And scaffolding materials?

A. That is planks and brackets and materials that go into it, and we also had some patent scaffold that was used for scaffolding.

Q. Now, without going in detail into the others, these figures that are shown there as \$38,557.01, what does that purport to represent?

A. That is the total actual cost of concrete form materials and miscellaneous small tools and such for the 100-F area.

Q. And is there a similar computation below that for 100-A area?

A. Yes, there is.

The Court: That seems like an awfully large

(Testimony of Ramon E. Reed.)

item for small tools, nails, and things, \$5,000 worth of hammers and small tools.

Mr. DeGarmo: I think the bookkeeper will be able to explain that better than Mr. Reed. We will skip that at this time. We have the books here which will explain it.

The Court: All right.

Q. (By Mr. DeGarmo): In the computation of yardage poured, from what source would that come, Mr. Reed; in the 100-F area it shows as 4168 cubic yards.

A. That came from the books, that is, the actual yardage that was purchased from the [1153] Commission.

Q. Then, I notice on this exhibit as contrasted with the previous exhibit on labor, that you use an estimated cost per cubic yard for materials. From what source did that estimated cost come?

A. That came from our estimate bid documents.

Q. From the bid documents? A. Yes.

Q. Now, how do you go about determining what you use as an estimate of cost of materials on a job of this kind for concrete forms and the forming of concrete?

A. This, the bidding of this job, came right after the completion of a job in Seattle and using the same type of forms and similar work of walls, and so forth, and this was arrived at, or you arrive at figures like that, by referring to previous job experience and then applying the factor which in your

(Testimony of Ramon E. Reed.)

own mind was suitable to the job that you are bidding.

Q. I notice on this exhibit for identification 33, Mr. Reed, that you have a different estimated cost per yard of the form materials and concrete materials with respect to 100-F area than you do with respect to 100-H area, in the one case it's \$6.10, and in the other \$6.49; will you tell us why that was?

A. In the 100-H area there was more form area per cubic yard of concrete which, I think, would require more [1154] materials and, therefore, the cost per cubic yard for form material.

Q. Then, the third sheet, I take it, is merely a recompilation of the first two? A. Yes.

Mr. DeGarmo: I will not offer this exhibit at this time inasmuch as I have additional testimony concerning it. Will you mark these two exhibits, please?

The Clerk: Marking Plaintiff's 34 and 35.

(Whereupon, Plaintiff's Exhibits Nos. 34 and 35, respectively, were marked for identification.)

(Exhibits shown to defendants' counsel Etter.)

Mr. Etter: May I ask is this supported with one of the exhibits?

Mr. DeGarmo: The item of rental charges, that is right.

Mr. Etter: That is 29, is it not?

Mr. DeGarmo: Exhibit 29, Item 8, I believe it is.

Mr. Carey: If Mr. Etter has no objection I don't

(Testimony of Ramon E. Reed.)

suppose that I ought to have. I don't see that it serves any purpose because we are not questioning that these documents contain the figures shown on the previous exhibits, 34 and 35.

Mr. DeGarmo: 34 and 35, yes, I would like to have [1155] the witness identify them.

The Court: I haven't seen them yet, go ahead.

Q. (By Mr. DeGarmo): Mr. Reed, I am handing you Plaintiff's Exhibit 34 for identification, will you state what it is (hands book to witness)?

A. That is the Associated General Contractors equipment rental manual. It's a way of determining the rental for equipment.

Q. Is that the manual which was used by you as a basis for the rental charges in Plaintiff's Exhibit 29 when you referred to AGC?

A. Yes, one similar; I don't know whether this is the one or not.

Q. You don't know whether that is the exact one? A. No.

Q. I am also handing you Plaintiff's Exhibit No. 35 for identification, will you state what it is? (Hands book to the witness.)

A. That is a compilation of rental rates for construction equipment published by the Associated Equipment Dealers.

Q. Is that the one that is commonly known as AED rates? A. Yes.

Q. That is an '56 manual, is it not, 1956?

A. Yes.

Q. And that is the equipment rental schedule

(Testimony of Ramon E. Reed.)

which was [1156] used by you in the preparation of Plaintiff's Exhibit 29 for rental rates?

A. I would imagine it was.

Q. Can you check to find out whether it is or not, I don't want your imagination.

Mr. Carey: Neither do we.

Mr. DeGarmo: I would rather have it either true or false.

Mr. Carey: I think there has been an overplus of it already.

A. It isn't the one that was used.

Mr. DeGarmo: It isn't the one? Well, if it isn't the one, that is what we want to find out.

Mr. Carey: Your Honor, I am making this objection that they have introduced this Exhibit 29 and say that is the AED; in this other one the schedule contains certain daily rates. Now, as far as I am concerned, I don't question that some schedule does contain those rates. I don't see any point in encumbering the record, maybe Mr. Etter would agree with me.

Mr. DeGarmo: Perhaps I can clarify the reason that I was trying to offer it, Mr. Carey. The question was raised this morning by the Court as to whether profit was or was not included, and these documents show in and of themselves whether there is a profit and whether there is [1157] not a profit, rather than having someone testify to that fact; that is the only purpose of it.

The Court: More to satisfy my curiosity than anything else, if counsel don't question the basis of

(Testimony of Ramon E. Reed.)

the figures, the Court is not disposed to do so. He might question on cross-examination if there is a contrast as to what they include or what they do not include.

A. It appears that the ones in here are greater.

Q. (By Mr. DeGarmo): You mean that the AED rates shown in the exhibit are higher than the ones shown in the other exhibit? A. Yes.

Q. I suspect you used a '55 manual and not '56.

Mr. Etter: We object to any higher rates.

The Court: They are available here.

Mr. DeGarmo: It may be helpful on cross-examination.

The Court: Yes. [1158]

* * *

Q. (By Mr. DeGarmo): Mr. Reed, I think you have already stated that there was an extension of time granted by the Atomic Energy Commission for the completion of the project which eliminated the imposition of liquidated damages under the contract. Will you state whether that determination had yet been made at the time that you left the project in late March of 1957?

A. No, sir, it hadn't been determined.

Q. At that time did you know whether you were going to get an extension of time or not?

A. Well, I knew that I was going to get some extension, I wasn't sure, we wouldn't get any liquidated damages. [1165]

Q. You didn't know how much? A. No.

* * *

(Testimony of Ramon E. Reed.)

Cross-Examination

By Mr. Etter: [1166]

* * *

Q. Now, in your Item 8 you have listed, Item 8, of course, there is listed "Equipmental rentals." Now, on Exhibit let me see.

The Clerk: Do you have 29, sir?

A. Yes.

Q. (By Mr. Etter): Do you have Exhibit No. 29, now? Isn't it the fact, Mr. Reed, that the charges that you have here on Item 3 of these different trips in company transportation, aren't they duplicated in the rentals of equipment that is set forth in Item 8? A. No, sir.

Q. Beg your pardon? [1170] A. No, sir.

Q. And you say there are no duplications of rentals that are shown in Item 8?

A. No, sir.

Q. And that these are separate and additional?

A. That is right.

Q. Items of expense?

A. This is strictly operating expense.

Q. No, but are there not rental expenses charged to those automobiles that you used?

A. Oh, certainly.

Q. Beg your pardon?

A. Yes, bare rental is charged in Exhibit 29.

The Court: One thing I was going to ask about this, I am not familiar with these rental rates that have been put in here, regardless of their origin. I

(Testimony of Ramon E. Reed.)

wonder if they were bare equipment rental on which the renter or the one renting them, was operating them, was obliged to pay for gas and oil and ordinary going upkeep, or whether the rental included the gas and oil?

A. No, they are bare rentals, just bare machinery rentals. Anybody that rents on that basis would have to furnish the gas and oil and expense of operation.

Q. (By Mr. Etter): I want to get into that in a little bit, your Honor. Now, on No. 29, the vehicles or the [1171] equipment is listed, is it not, on Exhibit 29, the transportation, or rather, the equipment that was used and the charges made for Item 3? A. That is correct, yes.

Q. The equipment is listed, is it not?

A. Yes.

Q. Now, can you tell me by looking at Exhibit 29 what equipment that was? A. Yes.

Q. All right, will you just tell me?

A. It's $\frac{3}{4}$ ton pickups and Ford Ranchwagons.

Q. $\frac{3}{4}$ ton pickups and Ford Ranchwagons?

A. There was a half ton pickup used, too.

Q. A half ton pickup? To the best of your knowledge would those be the vehicles, those five, that were used?

A. Yes, those would be the ones.

Q. Now, I notice that over here you have a rental per month charge of \$135, is that correct?

A. That is correct.

Q. And that was a charge, as you have explained,

(Testimony of Ramon E. Reed.)

that was taken from AGC rental rates and applied on Exhibit 29, to the charge, at least, for rental of these five vehicles?

A. That is right.

Q. That is right? Now, actually, in the company books [1172] these vehicles were the property of Morrison-Knudsen, were they not?

A. Yes, they were, as far as I know.

Q. Beg your pardon?

A. Yes, they were all owned by Morrison-Knudsen.

Q. And were they charged out of the equipment pool at Boise that the company maintained ?

A. Not especially Boise, but charged to the district.

Q. They were charged from a district pool?

A. Yes.

Q. Well, now, what was the actual charge against the job for the rental of this equipment?

A. I don't recall.

Mr. DeGarmo: Just a minute, Mr. Reed, I object to that question on the ground that some inter-company bookkeeping charge is no evidence of what was a proper or reasonable rental charge.

Mr. Etter: Well, I know, but this is a question concerning these people's losses here, so-called, in this operation, and we want to show that the equipment rental here is the equipment rental that is set by AGC but it is not realistic because they are not charged that against the job at all and that is not a loss; in fact, to allow the \$135 is to give them the

(Testimony of Ramon E. Reed.)

gain. In other words, we are going to show that they didn't rent these from AGC and pay \$135 [1173] a month; that the company rent them out of a fixed pool and paid their cost, which is allowable as damages.

Mr. DeGarmo: Well, now, that of course isn't exactly true. In the first place, what the company paid from its own pocket is purely company accounting; in other words, if the company maintains an equipment pool and when a piece of equipment goes on a company project the company charges itself, so to speak, ten dollars or twenty dollars, or whatever it may be, is no evidence. If we were going in and arguing that if it was twice those rates, I am sure Mr. Etter would not be in here saying those were proper rates, but it is purely an inter-company account.

Now, the question before this Court is not what this particular project might have been charged by Morrison-Knudsen Company, but what was the reasonable value of this equipment to Morrison-Knudsen Company and what it may charge out of Boise to this particular project has no evidentiary value at all.

The Court: I think the damages here are supposed to be on a compensatory basis, I assume, to compensation Morrison-Knudsen for their actual losses?

Mr. DeGarmo: That is right.

The Court: And I should think where you have a main office keeping accounts of costs here, that at

(Testimony of Ramon E. Reed.)

least it would be some evidence of costs, not conclusive, but it [1174] would have probative value to show what Morrison-Knudsen considered these vehicles were worth to them and what they were costing them on the job.

Mr. DeGarmo: Well, if counsel is going to tell the Court that he can show those items are costs, then I will withdraw the objection, but he cannot show that, all he can show is a figure.

The Court: Didn't you this morning refer to some figures out of the Boise office to justify some of these documents?

Mr. DeGarmo: No, sir.

The Court: I thought you did; I don't mean in connection with the vehicles, I mean in connection with some of these other items here. I thought you said that the Boise office charged so much for the job.

Mr. DeGarmo: General administrative.

The Court: General administration; so you used that as a basis, what the main office charged to the job, as a proportionate cost of the administration?

Mr. DeGarmo: That is correct.

The Court: If the shoe would work on one foot it should work on the other.

Mr. DeGarmo: Well, of course, oranges and apples don't always make equals.

The Court: No. [1175]

Mr. DeGarmo: Supposing we have a piece of equipment that we own and that has been fully depreciated and the company decides that for its own

(Testimony of Ramon E. Reed.)

internal accounting it is going to charge that piece of equipment out to this project at X dollars; now, that doesn't mean whether Morrison-Knudsen loses or wins by charging at that amount, that is what this particular job may bear for the purpose of internal accounting between the project and the home office, it has no relation to the project, whether that is the reasonable rental value of the equipment or not.

My objection is that the question that is asked here is: "What did Morrison-Knudsen Company from its home office pool charge this particular project for a particular bucket or a particular piece of equipment," is not evidence of its reasonable rental value and unless counsel can go beyond that mere figure and show that it does have some reference to actual or reasonable rental value, then I say to let the mere figure come in without a promise to show that they will follow it up, to show that it is reasonable rental value or that it is costs, as counsel says, that then it is improper testimony.

The Court: I am not too sure, Mr. DeGarmo, that fair rental value is the proper basis. Fair rental value could include, as I indicated this morning, would include property of the owner. I wouldn't rent an automobile unless [1176] I made some money out of it.

Mr. DeGarmo: That is correct; that is right.

The Court: And, after all, you are not entitled to lost profits for what you might have made had you

(Testimony of Ramon E. Reed.)

rented the equipment, you are using that equipment. I think if you got down to brass tacks, all you are entitled to is what you have lost, which would be the cost to you, including the depreciation and all the items that go into the cost of operation, paying taxes on it and the cost of operating an automobile; what did it cost you; and I think that we may fairly assume that an outfit like Morrison-Knudsen when they are charging things to a job are charging it on a cost basis, because they want to know how much profit they made out of it; so I think they do list it out on their books, it's fair to conclude that.

Mr. DeGarmo: Well, if the Court wants to accept that as a presumption, well, perhaps I am talking about nothing.

The Court: I am not taking it as a presumption, I am taking it as a reasonable inference that if they are taking cost-plus here, that they are trying to keep books here.

Mr. Carey: It's more than that, your Honor, it's an admission against interest.

The Court: Yes, I don't say that it is [1177] controlling, Mr. DeGarmo, it has probative value, it is subject to explanation if you want to show that these things are charged out at less than cost for inter-company bookkeeping.

Mr. DeGarmo: Well, my objection is in the record and I don't care to argue.

The Court: You don't care to argue it further. Don't say you don't care to argue it. Overruled, anyway.

(Testimony of Ramon E. Reed.)

(Last question read.)

Q. (By Mr. Etter): If you know.

A. I do not know.

Q. Would that be available in the company's records?

A. I imagine it is, yes, the rental rate.

Q. I see. Do you know this, Mr. Reed: is there a charge as a matter of practice, that is made in the company records to this job for these vehicles?

A. Yes.

Q. Beg your pardon? A. Yes, there is.

Q. There is a charge made to the job?

A. Yes.

Q. And that charge is what, made out of the central office at Boise?

A. Some of this would be out of the central office and some would be out of the district office equipment.

Q. I see. Now, that charge that is made against that [1178] vehicle, is that charge against the cost of the job? A. It's a monthly rental.

Q. It's a monthly charge against the cost of operation and doing the job, isn't that right?

A. Yes.

Q. Now, can you tell me whether or not Morrison-Knudsen paid \$135 for a $\frac{3}{4}$ ton pickup during the time of this strike? Did they pay any independent equipment rental agency \$135 a month?

A. No, sir.

(Testimony of Ramon E. Reed.)

Q. Did they pay any independent rental agency any of the amount listed per month here on any of these five vehicles? A. No, sir.

Q. And what this \$135 is, is just what it purports to be, a charge per month provided by AGC?

A. It's a charge that you would have to pay if you were renting from an outside agency.

Q. That is right. Now, for instance, if you needed the $\frac{3}{4}$ ton pickup truck down there and it was broken down and you couldn't get another one and you went to an independent rental depot and rented that, you would have to pay this amount, wouldn't you?

A. You probably would, yes, sir.

The Court: I am not sure whether you are referring [1179] now, Mr. Etter, to the vehicles in Exhibit 27 or the ones, all of them, in 29?

Mr. Etter: In 29 the ones that are listed, as I gather from Mr. Reed's testimony, the ones that were listed in the trips, used in the trips shown in Item 3, Exhibit No. 27.

The Court: Yes, I see. I understood, am I correct in assuming that all of these vehicles named in 29 were owned by the plaintiff; is that correct?

Mr. Etter: Yes.

The Court: There were not any on a rental basis here from outside sources? All right, go ahead.

Q. (By Mr. Etter): Now, this operational cost that you have here, is that included in any other item that you know of, of expense listed in any of the items where damages are claimed, Mr. Reed?

(Testimony of Ramon E. Reed.)

A. No, sir.

Q. Beg your pardon?

A. Not that I know of, no, sir.

Mr. Etter: Not that you know of?

The Court: Pardon me, I am not deciding anything here, I just want to get it straight in my own mind just what the exhibit involves. It seems to me, then, that the ten cents a mile which is charged in Exhibit 27 would have to be a charge on the basis of operating expense [1180]

* * *

Q. (By Mr. Etter): Can you tell me, Mr. Reed, in Exhibit 29, does that exhibit include both what you term major and minor equipment?

A. Yes, sir.

Q. It does? Now, all of these items that I notice here in 29 are based, and as you have indicated, are based at the rental rates of either the AGC, Associated General Contractors, or the Associated Equipment Dealers, that is AED, is that correct?

A. Yes.

Mr. DeGarmo: You will have to answer out loud, Mr. Reed, the reporter can't get a nod.

A. Yes.

Q. (By Mr. Etter): And all of these items of equipment, [1184] can you tell me whether all of these items of equipment were or were not company owned and controlled through the Boise office?

A. They are all company owned.

(Testimony of Ramon E. Reed.)

Q. And controlled through the Boise office, or at least through Morrison-Knudsen?

A. Through Morrison-Knudsen.

Q. Yes, and is it not true that as to all of these items that are listed here, the contract was charged a monthly rate as to each separate item by Morrison-Knudsen?

Mr. DeGarmo: I wish the same objection to show to this question as to the previous one.

The Court: The record may show your objection to it whenever it comes up, Mr. DeGarmo, without repeating it each time.

Mr. DeGarmo: Thank you.

A. Yes, we had the monthly rental rates on it.

Q. (By Mr. Etter): You don't know what they are?

A. No, I don't have them.

Q. But that is the practice, is it not?

A. Yes.

Q. And those rates were charged to the job as to each one of these items?

A. Yes. [1185]

Q. Now, isn't a lot of this minor equipment, if you know, transferred into the contract at a nominal valuation of ten dollars per item, and then it's transferred out at the same nominal valuation at the completion of the contract?

A. That is correct.

The Court: I am sorry, I didn't get that last.

Mr. Etter: As to some of these items in minor equipment, that generally the practice on minor equipment is that, it may be a computing machine

or typewriter, it is transferred into the job at ten dollars, and then transferred out at ten dollars?

(Testimony of Ramon E. Reed.)

A. Sometimes you have to spend a pretty good sum getting them running.

Q. (By Mr. Etter): I mean, there is nothing in the books here that indicates that such was done as to these minor items? A. Yes.

Q. So that there is a very small direct charge, then, in the use of minor equipment, to the job, if at all, isn't that correct?

A. That is right, insofar as the charge to the job; however, there is upkeep and maintenance.

Q. Would you say that the ten dollars, this ten dollar charge, is really a control item; that is, to control [1186] the equipment in and out and know where it is, and follow it up, an accounting control method rather than anything else?

A. I would imagine so.

Q. You would imagine so? Now, there are two items, as I notice in the equipment rentals of concrete forms. I believe that you listed one item somewhere in one of these with respect to the concrete forms, oh, yes, here.

Mr. DeGarmo: I think you will find that that was the item that we had pulled out of here.

Mr. Etter: Oh, is that right?

Mr. DeGarmo: Yes, your accountant discovered that there was one item in here he had discovered was included in the cost of materials in the revised second sheet. He took that out. I can tell you what the amount is, to tie it in.

(Testimony of Ramon E. Reed.)

Mr. Etter: The revised amount that you have, I do remember that now, but I don't think I got the amount.

Mr. DeGarmo: I will see if I can find that.

Mr. Etter: All right.

Mr. DeGarmo: Yes, there was 7,498 square feet of uniform concrete form panels, is that the item that you find there, at nine cents, at \$2,024.46, and patent scaffolding at \$525. [1187]

Mr. Etter: \$525, scaffolding, and what was the other now?

Mr. DeGarmo: Well, there are three items of 2,755 and 50 and 4,693, a total of 7,498 square feet of concrete uniform form panels at nine cents per month for three months, or \$2,024.46, which was eliminated from that Item 8 on the revised second sheet.

Mr. Etter: What would be the total claimed for that now, Mr. DeGarmo?

Mr. DeGarmo: Well, the total claimed now is \$27,043.13.

Mr. Etter: I see. Actually, am I right, weren't these concrete forms really in two classifications, those that you own and those that you rented?

Mr. DeGarmo: Yes.

Mr. Etter: You cleared that up, all right.

Q. Now, going here to Item 11, I think it is, it's my understanding from Exhibit, it's Exhibit 25, the engineer's projection, I think it is, yes, 24, Stanley, would that then be the engineer's projection? Take

(Testimony of Ramon E. Reed.)

that, will you, Mr. Reed, and I will inquire a little bit about that (hands paper to witness). Now, this projection, as you explained, indicates the number of days projected for the completion of the job, does it not? [1188] A. Yes.

Q. And, likewise, as I understand, this job should have been completed in December, is that correct, of 1956?

A. One area was October 1st and the other December 1st.

Q. Yes, but the entire project, taking the F and H areas together, would have been December?

A. That is correct.

Q. Now, at the time of the strike did you say that you were 18 days behind schedule on March 22, the day of the strike? A. Yes.

Q. Now, when you speak of 18 days you are referring, are you not, to 18 working days?

A. No, 18 days over-all, over-all days.

Q. Well, were you behind more than that if you took it on a revenue basis, I mean, I understand this one line, the dotted line, projects revenue, does it not in particular times, is that correct?

A. No, one line is the scheduled revenue and the other is the actual.

A. No, one line is the scheduled revenue and the other is the actual.

Q. One line is the scheduled revenue and the other is the actual? Now, your scheduled revenue as of March, the end of March, 1956, could you tell

(Testimony of Ramon E. Reed.)

me from looking at that chart how much it was, how much it would be, or would you be required to check your books? [1189]

A. \$163,000, it looks like. Let's see, at the end of March would be four hundred.

Q. Wouldn't it be over \$600,000?

A. Yes, six hundred and some thousand dollars.

Q. Approximately \$625,000, that is the figure that we arrived at in our examination, would that be fairly correct; I am just taking it as around there?

A. I think somewhere in there, 623 or 624, somewhere.

Q. The revenue actually received in March prior to this strike, just prior to the strike, was about \$398,000, isn't that correct? A. That is correct.

Q. So that the difference between the \$625,000 and the \$398,000 you were behind that much revenue even before the strike, isn't that correct?

A. That is right.

Q. And do you know how many days of revenue that equals you were behind at the time of this strike? A. No, sir, I don't know.

Q. Well, ordinarily, going up to about the end of March on the basis of your contract your revenue days were approximately 120 or 122, wouldn't that be correct? A. Yes.

Q. Starting your contract in December?

A. Yes, just about. [1190]

Q. And the average revenue per day would be the amount that was due at the end of March, divided by

(Testimony of Ramon E. Reed.)

the number of days, would that be correct? I mean, that would be your daily revenue based upon your projection?

A. That would be the average daily; of course, starting out you wouldn't.

Q. That would be the average daily, would it not?

A. Yes.

Q. And, consequently, the only way you could determine, Mr. Reed, how far back you were in revenue would be to take the average per day and then divide it into the difference between the revenue received and the revenue expected, to determine how many revenue days you were behind, isn't that right?

A. You are a little ahead of me, I don't quite follow you.

Q. Well, let's say that the amount of projected revenue after, or in March, at the end of March, the amount of the projected revenue on your chart here was \$625,139, and that at that time construction days or, rather, the days that elapsed in the contract in the total of 122, dividing 122 into the amount of projected revenue, at least my figures show, would give you an average per day of \$5,124 per day projected revenue over that period of 122 days?

A. Yes. [1191]

Q. However, the revenue received on that date was only 398 thousand and some odd dollars, so, dividing that amount by the average, actually you would only have 78 revenue producing days of

(Testimony of Ramon E. Reed.)

\$5,000, and you would be 44 days revenue behind on your projection; do you follow me?

Mr. DeGarmo: If he can, he is better with figures than I am.

A. I am not sure, I am not quite sure what you are driving at.

Mr. DeGarmo: We have our theory of this, we shall be able to explain it.

Q. (By Mr. Etter): As I understand it, the way you project this, when this projection reaches a particular point in line with the amount of money that you have over on the left-hand side, you expect at the end of so many days to be able, if you merge your projection schedules, you expect to have received so much revenue from this job, isn't that right?

A. That is right. At the end of each month there will be a certain percentage but that is not an average, you don't have an average over that period.

Q. At least, if you projected it, this broken line was your own projection, was it not?

A. Yes, sir, that was scheduled revenue, but that is not [1192] based on an average per day for over a certain time.

Q. No, but it was scheduled?

A. Yes, it's scheduled.

Q. So that at the end of March, if you look at that, you had scheduled revenue coming to the end of the job of \$625,000, that was your scheduled revenue, and yet the revenue that you had received was behind schedule, and you had only received on that

(Testimony of Ramon E. Reed.)

particular day \$398,000; so, isn't it true that you were nearly \$300,000 behind your scheduled projected revenue? A. That is right.

Q. So, if you wanted to break it down into days, then you can average, first, what the projected revenue per day is, and what it actually was?

A. You can't average it, no, sir.

Q. Well, in any event, your projected scheduled revenue was only half, about, what it should be, at the time of the strike, isn't that right?

A. That is about right, there is a little more than half.

Q. Beg your pardon?

A. Well, four hundred at the third.

Q. You were way behind your projection?

A. Well, we were 18 days behind.

Q. I am not talking about the number of days, I am talking about the revenue you were behind; you projected one line [1193] for revenue; now, you were behind almost \$300,000, weren't you?

A. No, we was behind 200 and some thousand.

Q. \$230,000 projected revenue you were short on your own projection, isn't that correct?

A. That is right.

Q. All right. Now, there was a loss on this contract, eventually, was there not, or do you know?

A. Due to the strike.

Q. Beg your pardon?

A. Yes, there has been a loss.

Q. And do you know how much that was?

A. No, sir, I don't know the final figure.

(Testimony of Ramon E. Reed.)

Q. You don't know the final figure? All right.

A. I don't think you can determine a final figure.

Q. Beg your pardon?

A. The books haven't been closed, you can't determine a final figure.

Q. I see. Now, on your general administrative expenses under Item 12 you computed those general administrative expenses on an estimated figure of 3% on a loss of revenue as you had projected it in this Exhibit No. 24, is that correct?

A. That 3% is not estimated, that is what the job is charged. [1194]

Q. The job is charged that over a 98-day period, isn't that right?

A. The job is charged that on the revenue that is taken in.

Q. Well, now, if you were 200 and some thousand dollars behind at the time the strike occurred, does that properly reflect a loss to you when you were behind that much on your own projection?

A. That doesn't have anything to do with it, that 3% is money that the business in Boise and Seattle all goes in, regardless of that.

Q. Yes, but you are claiming an item because you say that you had a certain loss of projected revenue, you have broken it down here in a chart, I think, you had a certain loss of projected revenue. Well, here it is in "General Administrative Expense," you have got original scheduled revenue and that is the schedule, is it not, that appears on 24

(Testimony of Ramon E. Reed.)

here, on Exhibit 24?

A. Yes, sir.

Q. And you are charging certain administrative expense and certain profits, as I understand it, based upon this projected revenue and the loss that the company sustained from the projected revenue because of the interference with your construction as a result of this strike, isn't that right?

A. That is right, the job extended 98 days, that is the [1195] days, or the other 98 days, there was 98 days of this that the main office had to do, they were depending on that money.

Q. Yes, at the end of the first 122 days when your scheduled revenue should have been \$625,000 without any strike or anything else on, you were estimating as a matter of fact, it was only 390 some thousand dollars, and yet you want to charge the defendants here with percentages of loss of projected revenue, isn't that what you are doing?

A. That is right.

Q. That is what you are doing?

A. Yes.

Q. Even though before there was any strike your projected revenue was behind \$240,000?

A. Oh, we have admitted that we were behind schedule, there is no question about it.

Q. There was that much loss and you continued to stay behind schedule?

A. Well, but it didn't necessarily mean that we were behind through the entire job.

Q. Well, wasn't this projection of yours wrong in other respects; for instance, turning here to Item 16, as an example, where you have charged or

(Testimony of Ramon E. Reed.)

claimed certain efficiency loss for labor and supplies, you have that [1196] Item 16 which I think is set up? A. I have it here.

Q. Exhibit 33. Well, now, have you got it there?

A. Yes, I have it.

Q. Oh, in the 100-H area, do you know how much, what your engineers' estimate of the amount of concrete that would have to be poured was, what your original engineers' estimate was?

A. I don't recall exactly, I know we placed or bought more concrete.

Q. Than your estimate? A. Yes.

Q. Would you agree with me if I told you that your estimate in the H area was 3,092 cubic yards?

A. It could be, if you have it, I don't know.

Q. And these figures that you have in 33 show that, instead of——

Mr. DeGarmo (Interposing): I was just trying to get a document to check your figures, that is all.

Mr. Etter: I think that is right.

Mr. DeGarmo: What was the figure that you gave?

Mr. Etter: 3,092, engineers' estimate on the 100-H area.

Mr. DeGarmo: H?

Mr. Etter: Yes. [1197]

Q. (By Mr. Etter): Now, as I gather it, looking here at the H area, actually you poured, and that is on Page 2, Mr. DeGarmo, of your Exhibit 33, your total yardage poured on the 100-H area was 3,429½ yards, correct?

(Testimony of Ramon E. Reed.)

A. That is probably the yardage purchased from GE.

Q. Well, it's set out in your own item here?

A. Yes.

Q. Now, assuming that the estimate was 3092, counsel is going to check that, I think it's correct, there was an excess of concrete poured over the engineers' estimate in bidding this job at 337½ cubic yards, isn't that correct? A. That is correct.

Q. And now going to the 100-F area, it's our information that the engineers' estimate on the 100-F area was 3,450 cubic yards. The Exhibit here, 33, on Page 2 shows that the total yardage poured ultimately was 4,168, or an excess over the engineers' estimate of 718 yards and, therefore, a total over the engineers' estimate of yardage poured over yardage estimated, of 1,055½ cubic yards of concrete; so that estimate was considerably short, wasn't it, that engineers' estimate?

A. Yes, I am not familiar with that engineers' estimate but those were the yardages.

Q. Now, isn't it a fact that when this computation was [1198] made here for excess labor costs there was no consideration given to the excess costs which were incurred by reason of the excess poured which was due to an under estimate of the Morrison-Knudsen bid of over a thousand cubic yards of concrete?

A. I don't follow you on that, sir.

Q. Well, in determining these amounts that you have claimed as efficiency loss for labor and sup-

(Testimony of Ramon E. Reed.)

plies, assuming if you will, Mr. Reed, that there was an excess pour of 1,055½ yards over the estimate, in other words, if the estimate was 6,542, the engineers' estimate, and the excess over that was 1,055½ yards, that would be additional expense, wouldn't it, arising from an excess over and above the original bid? Wasn't that an excess pour that you didn't expect to have when you bid it, when you estimated that many yards of concrete, originally?

A. Many of those yards were put in there in placing of forming and other expense, I wouldn't say that that was excess.

Q. Well, it was over the estimate, let's put it that way?

A. Not necessarily, because we could have done other work that would have cost more and used less concrete, so there is some balance there somewhere.

Q. Well, the figures indicate, however, that you poured [1199] 1,055 yards more than you estimated for this job; how do you explain that?

A. That could be. But then there is other places we probably didn't spend money for work.

Q. I am just talking about this pouring item, though, because you are asking for specific damages as to cost. Now, isn't it true that if the figures show that there was 1,055 yards more of concrete poured in H and F areas than originally estimated, that that was over and above that estimate for those two areas of concrete?

A. Just that concrete item.

Q. We are talking about the concrete item.

(Testimony of Ramon E. Reed.)

The Court: We will take a recess for ten minutes.

(Whereupon, a recess was taken for a period of ten minutes.)

The Court: All right, proceed.

Mr. Etter: Counsel has advised me, your Honor, that the figures that I used for the engineers' estimate on the concrete pouring were correct as to each locality and in the 100-H area that would be 3,092, and in the 100-F area it would be 3,450, isn't that correct?

Mr. DeGarmo: That is correct.

Mr. Etter: The 100-H area, 3,092, the 100-F area, 3,450.

The Court: All right. [1200]

Mr. Etter: And those were the engineers' estimate of pour. Then, of course, the Item 16, as indicated on Exhibit 33, Page 2, indicates that the total yardage in excess of those estimates was 1,055½ yards.

Q. Do you know, Mr. Reed, whether in making this computation that appears as a breakdown on Exhibit 33, do you know whether or not in computing those figures for excess labor costs, whether Morrison-Knudsen included the entire pour of 7,587½ yards, or whether they merely used the figure of the estimate on the contract, that is 6,542?

A. In computing what figure is that?

Q. In computing the excess labor cost that is claimed here under the title of "Efficiency Loss for Labor"?

(Testimony of Ramon E. Reed.)

A. Well, it's by cubic yards, and we used the actual yards.

Q. You used the actual yardage?

A. If we had used the theoretical, we would use the theoretical all the way through, and the cost per yard would be much more than it is here.

Q. But, as a matter of fact, isn't it true that a thousand yards of this excess cost was the result of a mistake in estimating the required amount of pour, to begin with?

A. It doesn't have anything to do with the labor in this [1201] material.

Q. Well, the contract was——

A. (Interposing): Per cubic yard, and that hasn't anything to do with this.

Q. Well, wasn't the contract bid as to cost on an estimate of cost of 6,542 cubic yards of concrete, isn't that the way this contract was bid, that that would be the amount that would have to be poured and, therefore, you estimated the cost of the concrete and the cost of pouring that much in your estimate? A. In the estimate, that is right.

Q. So that if 1,055 yards was poured more than the estimate you wouldn't say that was due to the strike of the engineers and teamsters, would you?

A. No, but that would increase if you used the estimated yardage or theoretical yardage, these figures would be much higher and you would end up with a much higher figure on this unit.

Q. But if you included this 1,055 yards, which was an estimate of yours to begin with in bidding

(Testimony of Ramon E. Reed.)

for this contract, if you used that in computing the loss due to the engineers and the teamsters strike, aren't you, in fact, charging the engineers and teamsters with an excess cost that was the result of your own mistake in bidding it? [1202]

A. No, sir, if you used the theoretical yardage in arriving at these excess cubic yards, your theoretical yardage would be much higher. This is strictly by yards, it is not in the bid, this is strictly by cubic yards, based on the actual yardage poured.

Q. But you used the entire yardage poured?

A. That is correct, and that is to the advantage here, reduces the actual cost by using it.

Q. All right. Now, in both of these areas, as I understand, there was an underground, or a slab below the level of the ground, that is what I should say, poured first, is that correct?

A. That is correct.

Q. And how far down was that, did you say?

A. It was about ten feet below the ground.

Q. Ten feet below ground surface?

A. Ten feet below ground surface.

Q. And were there walls, also, poured extending from ten feet down up to the ground surface?

A. Yes, sir.

Q. And then walls were poured extending up above ground surface, I gather?

A. No, no, there was just the foundation wall that came up about to the ground surface.

Q. Was there any concrete in addition to that

(Testimony of Ramon E. Reed.)

poured so [1203] far as buildings were concerned, on that slab; what was constructed on the slab?

A. A structural steel building.

Q. A structural steel building? Was there any concrete used in finishing that? In other words, was there a concrete pump house?

A. No, it's a structural steel frame cover over the pump area.

Q. A structural steel frame cover over the pump area? And, in other words, if I understand it correctly, there was no concrete then poured above ground level?

A. I don't recall there was.

Q. Either in the 100-F or the 100-H, is that correct?

A. I think that is correct, I don't recall that there was any poured above.

Q. I see. In pouring concrete, ordinarily, can you tell me does the cost of the pour increase as the pour rises?

A. Sometimes, but not in this instance.

Q. Sometimes, but not in this instance, and why?

A. Our forms had to be very true to line and grade in the footings and we had a good bit of winter protection in the first pours.

Q. I see. Now, in your total of supplies and reaching a total of supplies that were used in computing this cost, [1204] as I understand it, you used the complete cost of all the supplies that you used in the F and H areas?

A. That is right.

Q. In other words, you didn't estimate it, as

(Testimony of Ramon E. Reed.)

you say, from theoretical engineers' estimates, you used the entire materials used in estimating costs?

A. That is correct.

Q. Is that correct?

A. Yes, that is what it says, total actual costs.

Q. Now, one more item that I have some question about, and I call your attention to Item 8, which is the equipment rental. I think you said that there was a move-in charge, is that correct?

A. Yes, sir.

Q. For equipment? Now, in the bill of particulars there was an amount set in, or set out, rather, for move-in and move-out charge or, rather, a charge of \$1,540.34, do you know whether or not that was both a move-in and move-out charge which is in the bill of particulars that we were given?

A. It sounds like it might have been both, I don't know.

Q. Beg your pardon?

A. I don't know about that, if it was, why, it has been taken out.

Q. If that is a move-in and move-out charge, it shouldn't [1205] all be included in that item, am I correct in saying that?

A. Yes, there is only the move-in charge in this item now.

Q. So if that was a move-in and move-out, actually only half of it would be chargeable to this contract?

A. Not necessarily, because it is possible that the

(Testimony of Ramon E. Reed.)

machine went a lesser distance than you moved it in, some jobs are lucky.

Q. But, certainly, the move-out charge, whatever it might be, should be deducted if, in fact, it included a move-out charge? A. Yes, sir.

Q. Now, the company sustained a loss, did they not, or do you know, on this contract of about \$322,000?

A. I can't tell you, Mr. Etter, just the exact figure. I haven't had access to it.

Q. Well, do you know this, that even if the company was returned to the position that it would be in without the strike, in other words, recovered these items claimed as damages, there would have still been a loss on this contract, isn't that right?

A. If that amount is what is the loss now.

Q. If that amount is correct, there would have still been a loss on this contract, isn't that correct?

A. Yes. [1206]

Q. As I understand it, in the claim for the amount of damages the company claims 10%, do they not, for the loss of profits here?

A. I don't think that has come up.

Q. Ten per cent, as I understand it, whatever the percentage might have been ultimately, regardless of this strike, the company would have sustained a loss, there wouldn't have been any profit of any kind or of any per cent, isn't that true?

Mr. DeGarmo: I think that is rather argumentative, it answers it itself.

(Testimony of Ramon E. Reed.)

Mr. Etter: I think it does answer itself, that is why we are wondering about this 10%.

Mr. DeGarmo: I will argue that legally, but I don't think the witness can.

The Court: I will sustain the objection to the question in that form.

Mr. Etter: Well, I think you can examine if you wish to, Mr. Carey. I have gone through most of these items.

Cross-Examination

By Mr. Carey:

Q. Mr. Reed, as I recall, you said that you went on the job as project manager when the work first started?

A. I wasn't there the day that the rest of the people started, I came in later. [1207]

Q. Well, it seems to be admitted that the contract was dated November 25, 1955, and you went to work three days afterwards, on the 28th of November, '55, does that conform to your recollection?

A. I got there about the middle of December. We hadn't actually done any work.

Q. Then you remained as project manager how long? A. Until the first of April of '57.

Q. Of '57? A. Yes, '57.

Q. Well, you were there then until the completion of the job, were you? A. No, sir.

Q. And when was the job completed?

A. The work in F area was substantially com-

(Testimony of Ramon E. Reed.)

plete when I left. The completion date hadn't been determined.

Q. Well, we had a hearing here last June, specifically from June 10 to June 19, as I recall it. Was the job completed at that time? You testified during that hearing, do you remember?

A. Yes, I think it was finished.

Q. Well, are you sure; do you know?

A. Yes, I am sure it was.

Q. Then you were assigned to another job and went down to South America? [1208]

A. No, I went to California.

Q. And when was that, when were you assigned to the next job? A. The first of April.

Q. How long were you there?

A. Until the first of July.

Q. Of what year? A. Of '57.

Q. Well, then, you went to South America after the hearing in June here?

A. That is correct, yes.

Mr. Carey: Now, your Honor, I will try to avoid repetition, but I won't guarantee it.

The Court: All right.

Mr. Carey: Mr. Clerk, I wonder if you would hand Mr. Reed Exhibits 21 and 22?

The Clerk: You don't have them, do you?

Mr. Carey: 21 and 22, they are these.

Q. Refer first to 21, the copy that I have in some spots is a little bit dim. Down in the lower left-hand corner it says, "Approved for Morrison-Knudsen, title Project Engineer," and there is a

(Testimony of Ramon E. Reed.)

signature there that is not correct, or it is not visible on my copy, who? A. That is Mr. White.

Q. Mr. White? [1209] A. Yes.

Q. And over on the other corner, the lower right-hand corner, there is a date, what should that date be, do you know?

A. That is January 20, 1956.

Q. Now, January 20, '56? A. Yes.

Q. This was an exhibit, then, prepared after the work was in progress?

A. Well, yes, at the time it was started, just started.

Q. Just about the time it was started?

A. That is right.

Q. Had there been any substantial amount of work done at this time?

A. In F area, yes, there had. Excavation was well along, there was a sewer being installed, and the work was getting underway.

Q. Well, the work was started about November 28, of '55?

A. Actual work wasn't started on November 28th.

Q. Well, all I know is what the pleadings say, both complaints say it was, but what is your recollection, then, as to what date it was started, as nearly as you can remember it?

A. Oh, it was around the 18th or 20th of December, actually.

Q. And this date on this exhibit should be what? [1210]

(Testimony of Ramon E. Reed.)

A. The date on the exhibit? The date is all right.

Q. I know, but it don't show on my copy, that is what I am getting at.

A. Oh, I am sorry; 1/20/56.

Q. Well, this Exhibit 21 was made substantially 30 days after the work was started, 30 days more or less?

A. More or less.

Q. Yes, so that very largely it was not a record of actual performance but was a prediction of what somebody expected?

A. That is correct, yes, that is what we have pleaded.

Q. Well, in the contracting business predictions always do not prove true, do they?

A. Oh, no, not always, but we have a pretty good experience record for following schedules.

Q. Did you personally prepare this data appearing on 21?

A. No, I personally did not.

Q. You were just taking someone else's word for that?

A. Not necessarily, no, I was in with Mr. White on it, we both worked on it.

Q. Well, if there are any errors in it, who is responsible for the error, you or Mr. White?

A. Well, I suppose White, Arndt and myself, we all had a hand in it. They are pretty thoroughly checked by the AEC and if they don't like it, why, they turn it back [1211] to you and you make it out again.

Q. Well, it was what you expected would occur over the construction period?

A. Yes, sir.

(Testimony of Ramon E. Reed.)

Q. Now, is the same true of Plaintiff's Exhibit 22?

A. Yes, they were both made out the same.

Q. That is the same date on that one, 20?

A. Yes, 1/20/56.

Q. 1/20/56? At the time these two exhibits were made out some excavation had been made?

A. That is correct.

Q. Had the excavation been completed at that time?

A. No, sir, it hadn't been completed in either area, I don't believe. In H area I just don't recollect if it had been started yet.

Q. So that so far as that area was concerned, this is a prediction? A. That is right.

Q. Now, take the second item on Exhibit 21, "Architectural Revisions," what does that mean?

A. These buildings connected onto existing buildings, and those are walls that come out and work that was done to connect the two areas.

Q. None of that work was done at the time of preparation of this exhibit? [1212]

A. Oh, no.

Q. There appears to be 17 items on this Exhibit 21. Is it not a fact that as of the time this exhibit was prepared, the only work that was done of any substantial amount was excavation?

A. January 20 excavation, they placed some concrete.

Q. A very small amount, however?

A. Yes.

(Testimony of Ramon E. Reed.)

Q. So, generally speaking, with the exception of excavation and a very small amount of concrete, this exhibit is entirely a prediction of a hope?

A. Well, that is correct.

Q. And the same applies to 22?

A. That is right.

Q. Now, have you 24 before you? A. Yes.

Q. Plaintiff's 24? A. Yes.

Q. When was this made?

A. This was made October 11, '56. The date is on it, Mr. Carey, over by the title.

Q. Correct. Did you make this Exhibit 24?

A. I believe I helped make it.

Q. To what extent is this your work and to what extent is it the work of someone else? [1213]

A. Well, this work, it all ties back into these other exhibits. The scheduled revenue is tied back into Exhibits 22 and 21, and the actual revenue is taken off of the monthly estimate.

Q. Well, the figures that are on here representing revenue, you took someone else's word for that, didn't you, in plotting this exhibit?

A. Which figures?

Q. Well, any of these figures.

A. Well, they were all taken right off of these charts. This was all compiled from these charts.

Q. I see. Well, to the extent that Exhibits 21 and 22 are some work of someone else, the same is true of 24?

A. Well, I was in it, I don't have my name signed here, but I mean I was in the over-all pic-

(Testimony of Ramon E. Reed.)

ture, I don't know necessarily whether I did it myself.

Q. Well, referring to 24, in answer to Mr. Etter you said that at the time the strike occurred you were already 18 days behind schedule?

A. That is right, we admit that.

Q. Yes. Then this graph shows a straight horizontal line and that represents the strike period?

A. That is right, no revenue.

Q. No revenue. Then from there on upwards, your line representing actual revenue is practically parallel to [1214] the line representing anticipated revenue, isn't it?

A. Well, it isn't exactly parallel.

Q. Well, the variation is very slight

A. Well, it isn't parallel.

Q. Well, about this claimed loss of revenue, do you claim that when you start a job that you get the same amount of revenue each succeeding day as the work progresses?

A. No, sir. That is, this chart right here shows you that you don't.

Q. So, all of these three charts are just predictions, aren't they, or are they expectations?

A. That is right, this is a construction schedule, it's a part of this one over here (indicating).

Q. And just to the extent that there are hazards in the construction business, just to that extent these predictions may fail of fulfillment?

A. Well, they may, but we certainly go out of our way to see that they don't.

(Testimony of Ramon E. Reed.)

Q. Yes, but you sometimes do experience that?

A. Those things over which we have no control since this strike.

Q. And sometimes and frequently when you figure a job and you don't have any strikes, you can have a loss?

A. Oh, that is correct. [1215]

* * *

Mr. Carey: Let's see "Rental of Equipment." Yes, I am in error about that, as I frequently am. This refers to Exhibit 8.

Mr. Etter: Item 8.

Mr. Carey: Or Item 8, yes.

Q. You say you had made this up shortly after the strike ended?

A. Well, it was in that, yes, right in that period. I don't know just the exact date.

Q. And that is computed entirely upon these rental rates shown in these two schedules, one by the AGC and the other one by the AED, is that it? [1219]

A. Yes, I don't think it's this particular one that is in here.

Q. No, but one of those. A. AED.

Q. It is not made up on the basis of the charges Morrison-Knudsen made to this job?

A. No, sir, it's made up on charges that would have been made to us if we had gone out and had to get equipment.

Q. Yes, but you didn't do that, did you?

(Testimony of Ramon E. Reed.)

A. No, we were more fortunate.

Q. In the original bill of particulars you claim \$29,592 for that item. You are now claiming \$27,043 for the item, and isn't it a fact, if you know, that the actual amount that Morrison-Knudsen charged for the job for this Item 8 was only about \$9,100?

A. I don't know the actual figures.

Q. When you were making up this Exhibit 29, did you make any inquiry as to what the actual charge made to the job was?

A. We were not interested in the actual charge.

Q. You didn't care about that? A. No.

Q. And don't care now?

A. No, it's irrelevant, as far as I am concerned, this is what it would have cost my job if I had had to go out [1220] and get this equipment.

Q. Yes. All right, now, we are coming to that this minute. Morrison-Knudsen, on account of the size of their operations in most instances have their own equipment, haven't they?

A. Well, it depends on the type of contract.

Q. Yes, but generally speaking, though, they have their own equipment, are able to furnish their own job with their own equipment, and over a period of years they have their own schedule of charging, haven't they, and that is not what you used here? A. No, sir.

Q. Now, these rates then are rates used or suggested by these manuals of the AGC and the AED as suggested rates for particular pieces of equipment? A. That is right.

(Testimony of Ramon E. Reed.)

Q. They are binding on nobody, are they?

A. They are an average rate, compiled over rental rates.

Q. Oh, if a contractor other than Morrison-Knudsen who hasn't a large supply of his own equipment, has occasion to rent a crane from another contractor who has a crane but is not using it, this is a suggested rental rate made by the AGC?

A. The AED, yes, sir.

Q. But, to such contractors dealing for the rental of this [1221] equipment, they are not bound by this dealing, are they? A. No.

Q. As a matter of fact, it's a matter of dickering between them, isn't it, and the actual rental that contractor A might pay to contractor B, might be substantially less than this?

A. Well, I haven't been where you could dicker much on equipment, Mr. Carey.

Q. Pardon, I didn't get the answer.

A. I say, I haven't been where you could dicker very much on equipment, the rate has been pretty well established and you don't get much change.

Q. Well, to what extent have you had occasion to hire equipment yourself?

A. Not with Morrison-Knudsen here, but in the East I have been on jobs where you rented equipment.

Q. Well, this job was out West, wasn't it?

A. Oh, yes, that is what I say, but it isn't the established practice to rent equipment to somebody for one price, and to somebody else for another.

(Testimony of Ramon E. Reed.)

Q. Well, so far as your own personal experience is concerned, these rates that are shown on Plaintiff's Exhibit 29 are not rates with which you, personally, have had any experience, you haven't rented any equipment at these rates, have [1222] you?

A. Not on this job, no.

Q. Or any job in the State of Washington?

A. No, sir.

Q. No, any job anywhere in the West?

A. Well, that is irrelevant. I mean, this is the only job I have been on in the West.

Q. What is irrelevant?

A. Whether I have rented any equipment anywhere in the West.

Q. Well, you may think so, I don't. At any rate, you have no knowledge, as I understand it, of the actual amount that Morrison-Knudsen charged this job for these various items?

A. No, I couldn't tell you the exact amount, no, sir.

Q. Now, coming to Item 16, "Efficiency Loss for Labor and Supplies," that is Exhibit 33, have you got that in there? A. Yes, I have it.

Q. Now, when you are pouring a building and there is concrete in it, the cost of pouring each yard of concrete isn't the same, is it?

A. No, sir.

Q. In this instance, in both of these buildings you first poured a big slab?

A. No, sir. [1223]

(Testimony of Ramon E. Reed.)

Q. I thought you said you did.

A. No, sir, the slab was divided up into a number of small pours, it wasn't one big slab.

Q. Well, it's one big floor, isn't it?

A. Eventually, after the pours are all made, yes.

Q. Yes, and if you are pouring a large quantity of concrete, of course the cost per yard is likely to be less than if you are pouring small quantities?

A. That is correct; well, it depends on the forms that go into that concrete.

Q. Well, ordinarily you would have less forms in the slabs than you would have in the side walls, wouldn't you?

A. Ordinarily, yes.

Q. Yes; so, you would expect the side walls to cost more per yard than the slab?

A. Depending on the time of year you put it in.

Q. Anyway, the figures appearing on this Exhibit 33 are not figures that actually appear on the books of Morrison-Knudsen, but they are those figures supplemented by your calculations?

A. Now, which figures are you referring to?

Q. All of them.

A. No, sir, there are figures there that appear on our books.

Q. Which ones? [1224]

A. Labor cost to March 31, and labor cost to September 30.

Q. Well, those costs would have varied to some extent even had there been no strike, wouldn't they?

A. Well, sure, they would have varied, that labor cost of September 30 would have been much less.

(Testimony of Ramon E. Reed.)

Q. Yes, so there is, depending on when the work is done, there is always likely to be a variation in the unit cost?

A. Well, where he had to start up twice, like he did here, you get a much higher labor cost.

Q. Can you tell me why, in the original bill of particulars which was filed here on January 17, 1957, \$55,280 was claimed for that item, and in the amended bill of particulars \$92,835 was claimed for that item, that amended bill being filed on November 5, '57, and now that figure, in turn, is revised; why all these revisions?

A. I would have to have the background.

Q. You can't explain that?

A. I don't know.

Q. Well, it's pretty near adjournment time now. Do you think you could get that background by convening time in the morning?

Mr. DeGarmo: I might suggest, Mr. Carey, that this witness has been in South America since 1957; he just [1225] came back.

Mr. Carey: Well, you are relying on him to sustain a claim of a quarter of a million dollars. I think we are entitled to find out something about it.

Mr. DeGarmo: I have no objection, I just suggest that it would be difficult.

Q. (By Mr. Carey): Well, my question is: Do you know why this particular item was first calculated at \$55,000 plus, then increased to \$92,000 plus, and has now been recalculated at \$89,000 plus?

(Testimony of Ramon E. Reed.)

A. Well, it would appear that there were some things left out in the first calculations.

Q. Do you know who left it out?

A. Mr. Carey, I can't answer that.

Q. Do you know what was left out?

A. No, sir.

Q. Or why it was left out?

A. No, sir, I can't tell you without going back into the history of this thing.

Q. All right.

The Court: Did you participate in preparation of the amendments, Mr. Reed?

A. No, sir.

The Court: Mr. DeGarmo did that with some others, I suppose, is that correct? [1226]

A. Yes.

The Court: All right.

Q. (By Mr. Carey): Well, you can't give us any further information on that subject, then?

A. No, not the differences; no, I don't know.

Q. Oh, let me ask you this: This original contract, as I recall, with the Atomic Energy Commission, was for \$1,800,000?

A. As I recall, that is it, yes.

The Court: Let's see, that is the two of them?

Mr. Carey: Yes, in the aggregate.

The Court: Yes, the two.

Mr. Carey: The F area, as shown by Exhibit

1—

Mr. DeGarmo (Interposing): 21, I think.

(Testimony of Ramon E. Reed.)

Q. (By Mr. Carey): Or 21, yes, your estimated cost was \$908,000 plus? A. That is right.

Q. And your estimated cost of area H, as shown on Exhibit 22, what is that, 863——

A. Eight hundred sixty-eight.

Q. Eight hundred? Now, is there any extra work done on this job in addition to the work required by the original specifications?

A. Yes, sir. [1227]

Q. How much?

A. I don't know the total amount.

Q. When was that ordered?

A. That was done during the installation of equipment.

Q. Well, none of these exhibits reflect that?

A. Yes.

The Court: Did he give the extent of the extra work?

Mr. DeGarmo: He said he could not give the amount.

Mr. Carey: He said he could not, that is what I was asking him about.

Q. You don't know anything about that, then, Mr. Reed? A. Not the exact figures.

Q. Well, figures that are not exact are not of much use.

The Court: Well, this contract covers two structures within the area down there, or additions to the structures?

A. Yes.

(Testimony of Ramon E. Reed.)

The Court: Those buildings are nearly all concrete, aren't they, basically concrete?

A. Well, the foundation was concrete, with the structural frame building covered with transite siding.

The Court: What?

A. Corrugated transite siding.

The Court: Were they pumping plants? [1228]

A. Yes, they were, to increase their pumping, the quantity of water, for the reactors.

The Court: They pumped an immense amount of water out of the Columbia River, then?

A. Yes, this was to increase that pumping.

The Court: Well, Mr. Carey, I think we might as well quit for today. I think if we do this well every day, we should get through this week. Court will adjourn until tomorrow morning at ten o'clock.

(Whereupon, court was adjourned until ten o'clock a.m. on February 25, 1958.) [1229]

Tuesday, February 25, 1958—10:00 o'Clock A.M.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit:)

RAMON E. REED

recalled as a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

Mr. Carey: It will take me about ten minutes.

The Court: All right.

Q. (By Mr. Carey): Mr. Reed, yesterday afternoon I was asking you about your Exhibits 21 and 22, you recognize what I am talking about?

A. Yes.

Q. Now, the original contract price for the two areas was \$1,850,000, in round numbers, wasn't it, do you remember that? A. Yes.

Q. And that covered both of the areas stipulated in the original contract, that figure? [1230]

A. Yes.

Q. Now, as shown by your Exhibit 21, your estimated cost on area F was \$908,380, that is correct, isn't it? A. Yes.

Q. And your estimated cost on area H was \$868,800? A. That is right.

Q. Yes, or a total, as I make it, of \$1,777,180, do you care to check that?

A. That is about what it is.

Q. So the difference between your estimated cost and your contract price of \$1,850,000 would be your profit, if everything went according to plan?

A. No, sir.

Q. Why not?

(Testimony of Ramon E. Reed.)

A. Because there is two other items that aren't included in these.

Q. What are those two other items (paper handed to the witness by counsel De Garmo)?

A. Well, there were some small office additions and modifications.

Q. Well, you are referring to extras?

A. No, these are just the first two items of our contract. There is three other lump sum items in our contract.

Q. Well, do I understand the contract price was something in excess of \$1,850,000?

A. No, sir, \$1,869,580 is the total contract price.

Q. Well, then, what is it you are going to increase, the figures shown on Exhibits 21 and 22?

A. No, sir, these are the only two areas that is involved. There is three other items in the contract, there are three other contracts.

Q. Well, what I am trying to get at is, are those three other items included in the contract price of \$1,800,000?

A. Yes, sir.

Q. Well, then, if you perform the entire contract, that is the amount you would get paid by the government, isn't it?

A. That is correct.

Q. Yes. Well, what is your estimated cost of performing the work for which you were going to get \$1,850,000?

The Court: Pardon me, I may be getting a little confused here but I thought this Exhibit 21 covered the estimated cost of 100-F area construction, and 22 covered 100-H estimated cost. Now, what is this

(Testimony of Ramon E. Reed.)

about other things not included here; aren't these documents complete?

Mr. DeGarmo: I think if your Honor will examine an exhibit already in evidence, it will become immediately apparent. This is Plaintiff's Exhibit 1, as to where the difference is.

Mr. Carey: I had the same understanding as your [1232] Honor.

Mr. DeGarmo: The exhibit explains it very quickly (paper handed to the Court).

The Court: The twenty thousand fifty-one, were those extras that were not in the original contract?

Mr. DeGarmo: That is the original contract.

The Court: Oh, I see.

Mr. DeGarmo: There are five different items in the contract.

The Court: There are three items here that are not in these two exhibits? Go ahead, Mr. Carey.

Mr. Carey: Well, I had the same misunderstanding, if it was a misunderstanding, as your Honor.

Q. Then, the total cost of the original contract was the amount shown on Exhibits 21 and 22, plus that amount, is that correct?

A. Those three other items.

Q. And the total of those three other items is what?

The Court: Do you want to see it? Let's see, that is in evidence here.

Mr. DeGarmo: Yes, that is Plaintiff's 1.

The Court: Have I got that here?

Mr. DeGarmo: No, you don't have it.

(Testimony of Ramon E. Reed.)

The Clerk: No, you don't have it. That came in in the first hearing, your Honor. [1233]

The Court: Oh, I see.

A. The total amount of the contract is \$1,869,580.

Q. (By Mr. Carey): All right. Now, I am trying to get the total that you have there. You say the total cost was what is shown on Plaintiff's 21, 22, plus this amount of twenty thousand odd, is that right?

A. No, plus the amount of ninety-two thousand plus.

Q. Ninety-two thousand? A. Yes.

Q. Well, is that an estimated cost not included in Plaintiff's Exhibits 21 and 22?

A. Yes, there are three items that aren't included in it, these three items are just the first two in the contract.

Q. Well, what I am trying to find out, Mr. Reed, is the amount of the items that you say should be included in your total cost in addition to the amount shown on Exhibits 21 and 22. I understood you to say it was \$20,000, more or less.

A. No, there is three items; there are two items of \$20,400, and one item of \$51,600.

Q. Well, give us the total, then, of all the items, that is all I am after.

The Clerk: Would you like a paper, sir?

The Court: What you are asking for is the total of [1234] the items not in 21 and 22?

Mr. Carey: Yes, that is what I am driving at.

The Court: I see.

(Testimony of Ramon E. Reed.)

A. \$92,400.

Q. (By Mr. Carey): \$92,200?

A. Four hundred.

Q. Four hundred? Well, your total cost, then, if my arithmetic is correct, is \$1,869,580?

A. That is correct, that is the total contract amount.

Q. Well, that is a little bit in excess of your contract price, isn't it?

A. No, that is the contract price.

Q. Well, is this sum of \$92,400, is that your estimated cost or is that what you are going to be paid for it by the government?

A. That is the contract cost, that is the contract price, what we were paid for doing the work.

Q. Well, can you tell us what the cost of doing that work was? A. No, I cannot.

Q. You don't know? Well, then, if your contract price was \$1,869,000, \$1,869,580, what do you estimate or did you estimate was the total cost to you of doing that work for which you were going to be paid that amount of money? [1235]

A. Oh, I don't know that.

Q. You don't know? A. No.

Q. Well, the difference, whatever it would be, would represent the profit or loss in the case, as the case might be? A. Well, that is right, yes.

Q. But you don't know what that is?

A. No, I don't know what that is.

Q. That is, if the work had gone along just as you had estimated at the time you made Exhibits

(Testimony of Ramon E. Reed.)

21 and 22, you are unable at the moment to tell the Court whether you would have made a profit or loss on the job?

A. Why, I am sure there was a profit, some amount figured.

Q. Well, can you tell us how much?

A. No, I can't tell you how much.

Q. Who can?

A. I don't know, I imagine somebody.

Q. Is there anybody that you know of that can?

A. I don't know.

Mr. DeGarmo: I think we have two people.

Mr. Carey: Well, now, just a moment.

The Court: The witness can always answer he doesn't know. He is not supposed to know everything.

Q. (By Mr. Carey): Well, so far as you know, then, so far [1236] as your own personal knowledge goes, there is no basis in your information for making any calculation upon the basis of 10% profit on this job, is there?

A. I don't quite understand what you mean.

Mr. Carey: Well, all right, that is all.

Mr. Etter: I have just a few more questions on a few matters yesterday.

The Court: Go ahead and finish you cross-examination and then we will have redirect.

(Testimony of Ramon E. Reed.)

Cross-Examination

(Continued)

By Mr. Etter:

Q. On Item 2, may I inquire about that. I am going to ask just about a couple of items on that front page; you may or may not have the information. If you don't, why, one of your other witnesses probably will have. Directing your attention first to the 100-H area, which is the first one, Mr. Reed?

A. Yes.

Q. I note that you have a cost figured out, or at least it has been figured out, shall we say, "Labor Cost to March 31," which would be a labor cost preceding the strike, as I gather it, of \$20.91 per cubic yard, do you follow me on that figure?

A. Yes, sir. [1237]

Q. That is a labor cost in pouring the number of yards indicated during the work that was being carried on up until March 31, 1956?

A. That is right; that is correct.

Q. Are you able to tell me what your cost estimate was prior to the commencement of this job, per cubic yard, for labor costs in pouring concrete?

A. No, sir, I do not have that.

Q. You do not have that? A. No.

Q. Now, looking at the 100-F area, which is the area preceding, the labor cost to March 31, 1956, in the 100-F area is indicated as being \$28.41 per cubic yard?

A. Yes.

Q. In line with the other question I would as-

(Testimony of Ramon E. Reed.)

sume you do not know what the estimated cost price per pour was? A. No.

Q. Now, just turning that page over, if you will, or turn the first page over, there is a total yardage poured, I see, of material, and an estimated cost, and in this item you have the estimated cost per cubic yard of \$6.10 per yard in the F area? A. Yes.

Q. Now, that estimated cost, I assume, was the estimated cost in the contract bid, am I correct?

A. Yes, that was in our bid documents.

Q. That was in your bid documents?

A. Yes.

Q. And that was prior to March 31, was it?

A. Yes, sir.

Q. And, likewise, in the 100-H area the estimated cost per yard is \$6.49, do you notice that?

A. That is right.

Q. Now, going back to the 100-F area, and going back to the estimated cost per cubic yard, can you tell me what was the actual cost per cubic yard of the cement itself, and I gather this is material, this refers to material rather than labor cost; can you tell me what the actual material cost was prior to the strike per cubic yard of concrete?

A. No, sir, I can't tell you that.

Q. And that would be with respect to both 100-F and 100-H areas? A. I don't know.

Q. Now, just one other question, I just touched on this the other day. I would like to call your attention to 29, and over on the second page I want to call your attention down to where there are the words

(Testimony of Ramon E. Reed.)

“Total” appearing four times, down at the bottom of the second page of 29, and I note that listed there is “Total [1239] Move-in Cost, Lorraine MC-414, \$770.17,” do you notice that? A. Yes.

The Court: What number of exhibit?

Mr. Etter: 29, your Honor.

The Court: All right, I have it here.

Q. (By Mr. Etter): And I am talking about the second to the last item to your left, “Move-in Cost, Lorraine MC-414, \$770.17,” then you will notice there is charged immediately under that, “Move-out Cost, 414, estimated \$701.17,” do you notice that? A. Yes.

Q. Now, your testimony yesterday, as I gather it, was that the job itself was charged with the move-in cost, but on the move-out another job would be charged with that, is that correct?

A. Yes, that is the way it operates.

Q. Then, this one amount of \$770.17, because, first, it's estimated and because, as I understand your testimony, you are charged only on the job with the move-in cost, is actually an unjustified item or addition, is it not?

A. No, sir, not in this instance.

Q. Why not?

A. This is a cost directly attributable to the strike. This machine would have been down close to the area [1240] where this other contract was, in fact, it went back to the contract from which it came.

Q. It went back to the contract from which it came, but it was not charged to that transaction or

(Testimony of Ramon E. Reed.)

contract? A. I don't understand.

Q. Well, you said yesterday that this job would be charged with the move-in cost of equipment, and you have charged it. Now, it is also charged with the move-out cost? A. That is right.

Q. It went to another job?

A. This is an additional cost, additional company cost, incurred because of the strike.

Q. Why, because of the strike?

A. Because this equipment was moved from Oregon up to Richland and moved directly right back to Oregon.

Q. Well, it was used back in Oregon, was it not?

A. That is right.

Q. It was used on the job; was it charged, can you tell me whether the move-in cost when it went back to Oregon was charged to the Oregon job?

A. Well, I imagine it was, but still that is still a cost incurred due to the strike on the company, maybe not to this job, but it was a company cost.

The Court: What is this machine, equipment it is, [1241] isn't it?

Mr. Etter: Yes, heavy equipment.

The Court: It's a motor crane, motor crane used for excavation?

A. Yes.

The Court: Did it do its work fully in Richland before it was moved back?

A. It never was used, never turned a wheel in Richland.

The Court: It was up there and then because of

(Testimony of Ramon E. Reed.)

the delay in the strike it was sent back without being used?

A. It was on the way to the job when the strike started, and then we kept it on the job, never knowing from day to day when the strike would be over, and then after two months it was moved back to Oregon to the job from which it came.

The Court: Without doing anything at Richland?

A. Never turned a wheel at Richland.

The Court: All right, go ahead.

Q. (By Mr. Etter): But you say you assumed that the move-in charge was assessed against the Oregon job? A. The move back charge.

Q. The move back charge?

A. Well, but it is still a company cost.

Q. It is still a company cost, but it was charged against the Oregon job? [1242]

* * *

Redirect Examination

By Mr. DeGarmo: [1243]

* * *

Q. Now, Mr. Reed, referring to the exhibit, the graph exhibit, which I think is No. 23 or 24.

The Clerk: 24.

Q. (By Mr. DeGarmo): You have already testified that as of March 22 this graph indicates that the progress of the work, the actual progress of the work, was 18 days behind the anticipated or charted

(Testimony of Ramon E. Reed.)

progress, the scheduled progress as of that date (shows paper to witness). Will you tell us what were the reasons why the actual progress was behind the contemplated progress as of that date?

A. Well, we had exceptionally cold weather in February, which delayed our work.

Q. How did that delay the work, mere cold weather?

A. Placing the concrete in cold weather is difficult, and then we had a sewer line that went around building F, right around close to the sides of it, and the concrete of the joints had to be delayed in instances due to the cold weather.

The Court: When did you start to work?

A. This F was started, oh, soon after the 15th of January, [1245] the excavation.

The Court: But how soon did you start pouring concrete?

A. We were pouring concrete in January.

The Court: You started that simultaneously with the excavation? You did the excavation first, didn't you?

A. Yes; the bulk excavation, but we were working in this area during February, in order to maintain our schedule, when all the other work in the area was practically shut down. The other contractors were, they just shut down and went home, where we were trying to maintain a schedule and get it done during this cold weather, and the work that should have gone along expeditiously.

The Court: When you make out a schedule don't

(Testimony of Ramon E. Reed.)

you make out any allowance for possible weather delays in wintertime?

A. No, sir; not down here; not like the weather we had there in February. You do in some places where you expect real cold weather.

Q. (By Mr. DeGarmo): Was this weather in February of '56 a normal February, or was it something unusual?

A. No; it was unusual; it was unusual weather. Mr. Etter: So was '55.

Mr. Carey: Was the Union responsible for that weather condition? [1246]

The Court: I think this is an explanation of why he got 18 days behind.

Mr. DeGarmo: That is right. We are not claiming anything on account of that.

Q. You mentioned this sewer, what was there about that that delayed the work, and was that part of your work or was that something that was not contemplated in your work?

A. Both. On excavation we tied in the existing sewers in four spots, or three places, and where we tied in to the existing sewer lines, we ran into reinforcing steel and more difficult excavation of existing concrete than shown in the plans, and also we ran into more contamination, the contaminated area in these three spots, than was expected.

Q. What did contamination have to do with delay?

A. Well, where you are in a radiation area, your men are reasonably allowed to be in this area for a

(Testimony of Ramon E. Reed.)

certain number of minutes or hours, depending upon the intensity of the radiation.

Q. All right. Now, you have mentioned the weather and this sewer problem; was there any other problem that came about before March 22?

A. Yes; there was a sheet metal strike. I believe that the sheet metal workers put up a picket line that only the [1247] Teamsters observed, and we couldn't get the concrete for a couple of days, I believe it was, two, or something like that.

Q. Do you recall when, approximately, in the year that occurred?

A. That was in February of '56.

Q. That was in February of '56?

A. Yes; I believe it was in February.

Q. Was that strike something you anticipated when you set up your original schedule?

A. No, sir.

Q. All right. Now, did those three delays combined, that, is your weather and your sheet metal workers strike, and your sewer problem, account for this delay that you have mentioned, the 18 days behind progress, was there any other conditions that you know of that caused that?

A. No; I think that that would cover it, the strike and the weather and the radiation and the trouble we had in getting this sewer around the area.

Q. Now, Mr. Reed, calling your attention now to Plaintiff's Exhibit 21, first, which covers the 100-F area, will you tell us from that schedule, as-

(Testimony of Ramon E. Reed.)

suming that the 18 days had been added, the 18 days which you were behind schedule as of March 22, that that had been added to the construction progress which was anticipated on that [1248] chart, when would you have completed the pouring of concrete in the 100-F area?

A. Well, it would have been about May 18, I guess.

Q. Well, when does the construction chart show the pouring of concrete to have been completed as originally contemplated? A. May 1st.

Q. May 1st? And you would add the 18 days to that? A. Yes, sir.

Q. All right. Will you now refer to Plaintiff's Exhibit 22, with respect to the 100-H area and assume again that the 18 days of behind progress as of March 22 is added to the originally scheduled time for pouring of concrete, and tell us when you would have completed the pouring of concrete?

A. That would have been on June 18. You would have hoped to have made up those 18 days.

Q. But even assuming that you didn't make them up, you would still have been completed by when? A. June 18.

Q. Now, as a matter of fact, when did you pour the concrete in this area or complete the pouring, approximately?

A. Oh, it was in September some time, that is the bulk of it, but then you had a little bit all through the job.

Q. Well, I am speaking of the bulk. [1249]

(Testimony of Ramon E. Reed.)

A. The bulk of it.

Q. Not the small clean-up jobs.

A. In September. [1250]

Q. What, if any, effect upon your progress during the pouring of this concrete during the summer months of 1956 did it have other than cost?

A. Well, we sustained delays on the placing of concrete in hot weather.

Q. What is the difficulty which you encounter when you attempt to place concrete in the summer months?

A. Well, oftentimes the concrete when we got it, it wasn't plastic enough, they wouldn't put enough water, there wouldn't be enough water in it; there would be delays in getting it out of the mixer and then you had to cure much more, spend more money in curing it, keeping it wetted down.

The Court: Do you have to keep the surface damp?

A. Yes.

Q. (By Mr. DeGarmo): By the way, while we are on the subject of concrete, from what source did you obtain the concrete that was used on this job?

A. We bought it from the General Electric Company and they had a subcontract with Frank, oh, I can't think of his name; it was a small contractor there in Richland.

Q. Well, where, physically, was it hauled from to the job site?

A. Oh, it was approximately ten miles from the site, back in the back part of the area. [1251]

(Testimony of Ramon E. Reed.)

Q. And in what type of conveyance was it hauled from the mix plant to where it was actually poured?

A. In Transimix trucks.

Q. I will come back to that again in a moment, but I want to pursue again this question of the delays. Other than any delay that was occasioned by the pouring of concrete in the summer months after March 22, let's say, after the work resumed after the strike, what, if any, delays of any unusual character did you encounter up until October?

A. We didn't encounter any.

Q. You had no problems after you once got back to work as far as weather or these other things, like you had before?

A. No, sir.

Q. Do you recall, Mr. Reed, when it was that you actually were able to start work again after the strike period, bearing in mind that date?

A. June 17 was when we started.

Q. June 17?

A. That was after the Carpenters labor dispute.

Mr. DeGarmo: May I have Plaintiff's 23?

Q. Yesterday during cross-examination by Mr. Etter, some questions were asked relative to Plaintiff's Exhibits 21 and 22, and also I think they related to Exhibit 24, [1252] the three construction status charts, indicating an average revenue, average daily revenue. I wish to ask you if any of these charts are prepared on the basis of an average daily revenue?

A. No; that is imposible because your revenue

(Testimony of Ramon E. Reed.)

items are scheduled at different times so that it's impossible to have an average there.

Q. Well, now, will you state whether Exhibit 23 shows both scheduled and actual received income or revenue from this project during the period of these charts?

A. Yes; up to the first of October.

Q. Well, now, I note in the first month of December, 1955, there is scheduled revenue of \$18,167, and then the next month, in January, it jumps to \$90,442. What is the reason that it is 18 in one month and then 90 the next?

A. Well, it's \$18,000 in one month because you are just getting started and that just covers excavation items and then in January your excavation is well along and you are starting your concrete and reinforcing steel, so other pay items are coming into the picture.

Q. So that the amount of income which you receive is not uniform each month, then?

A. No, sir.

The Court: Pardon me, is 23 in evidence? [1253]

Mr. DeGarmo: Yes; I have 23. This is the one that I did not have extra copies of, I am sorry. (Q.) I also note in the latter end of the scheduled revenue that whereas it shows \$187,593 scheduled revenue in July, \$157,572 in August, and then it drops to \$52,128 in September, to \$26,064 in October, and a similar amount in November; now, why those changes in scheduled revenue?

A. Well, that is where the bulk of your work

(Testimony of Ramon E. Reed.)

is finished and this is just clean-up work or finishing up various items on which there isn't too much revenue.

Q. Well, then, is it a fair statement that the amount of revenue is dependent upon the amount of work that you are doing in the particular month, that is what produces the revenue? A. Yes.

Q. And if you do more work one month than the next, then your revenue is greater?

A. That is correct. [1254]

* * *

Q. Do you have Exhibit 33 in front of you there? A. Yes; I do.

Q. Yesterday in cross-examination of you by Mr. Etter, it was brought out that, whereas, the bid estimate or job estimate for the 100-H area showed 3,092 cubic yards of concrete that, actually, according to Plaintiff's Exhibit 33 there were poured 3,429½ cubic yards and it was [1263] also brought out in connection with area F that, whereas, the bid estimate showed 3,450 cubic yards that there were actually poured, according to Plaintiff's Exhibit 33, 4,168 cubic yards. Can you tell us, Mr. Reed, what was the reason for this additional yardage which was actually poured upon the job over that which was originally estimated?

A. Well, we didn't get the yield per cubic yard that was estimated.

Q. Now, what do you mean by "yield per cubic yard" so that we can understand it?

(Testimony of Ramon E. Reed.)

A. Well, the mix cubic yards at the batch plant wouldn't fill the cubic yard of form; we didn't get the yield. The mix, that was mixed based on a cubic yard, but when we got it to the area and poured it in the forms it didn't yield a full cubic yard.

Q. Now, you have already testified that the ready-mix was hauled approximately ten miles between the plant and the place where it was used?

A. Yes.

Q. Would that have any effect upon the yardage obtained at the pouring site?

A. Yes; it would. We complained bitterly about this throughout but they didn't seem to believe it.

Q. You didn't make it stick? [1264]

A. No; and the people who worked there previously told us that they always used 25 cubic feet per cubic yards instead of the 27 which we were foolish enough to use.

Q. Now, was there any other reason than this difficulty caused by the haul, in other words, your yardage does not pan out at the site as it did at the mix plant, was there any other reason?

A. We used more concrete in our backfill than was anticipated.

Q. Now, what do you mean by that, will you explain it?

A. Oh, in our trenches, for instance, in H area the sides would be sloped and instead of a back-filling with dirt, tamping it, which wasn't available, the dirt wasn't there, we backfilled with the concrete and some of this was over and above what was

(Testimony of Ramon E. Reed.)

originally contemplated. In H area we had a man-hole that turned out to be pretty well contaminated and our excavation around this manhole was much larger than would ordinarily be figured and then the earth underneath the floor slabs was gravel and it was difficult to excavate that right to the excavation lines. The AEC or GE, they don't go for much backfilling underneath their floors and foundations, so this had to be right; anything over and above had to be filled with concrete.

Q. In other words, if you put the concrete in there you [1265] didn't get paid for it but, nevertheless, it went in?

A. That is correct.

Q. Well, now, I only brought this out because it had been raised on cross-examination. Will you tell us, now, whether the cost of concrete appears any place in Plaintiff's Exhibit 33?

A. No, sir; there is no concrete cost whatsoever in these figures. This is all form materials and lumber and material that went into the forms in which the concrete was poured.

Q. Well, then, the materials on the sheet two do not include the cost of the concrete itself?

A. No, sir.

Q. Regardless of whether it was one yard or a thousand yards? A. No.

Q. Mr. Reed, I believe you have already testified that the initial completion date on the 100-F area was October 1st and initial completion date on the 100-H area was December 1st, 1956. What effect

(Testimony of Ramon E. Reed.)

upon the costs of performing this project did the running over of this job into the winter months of 1956-57 have?

A. Why, your costs are always increased in winter weather.

Q. Now, to your knowledge is any claim being asserted here [1266] on account of that cost?

A. Not to my knowledge, no. If your efficiency drops, it just costs more.

Mr. DeGarmo: I have no further questions of Mr. Reed.

Mr. Carey: Have you got anything?

Mr. Etter: I may have. I notice it's 11:00 o'clock.

The Court: We may as well take a ten-minute recess.

(Whereupon, a recess was taken for a period of ten minutes.)

The Court: Proceed. Had you finished?

Mr. DeGarmo: Yes; I had completed my redirect.

The Court: Your first cross.

Recross-Examination

By Mr. Etter:

Q. I have just a few questions. Now, Mr. Reed, there was some reference made to Exhibit 23, do you recall what that is, which is the scheduled actual revenue and revenue shortage? A. Yes.

Q. Now, the thing, this projection of yours originally that you made was a projection with re-

(Testimony of Ramon E. Reed.)

spect to revenue, isn't that correct, ultimately it ended up with a projection as to revenue as indicated in Exhibit 24, I mean? [1267]

A. Those curves are based on revenue.

Q. Those curves are based on revenue? And this chart was drawn up following the making of Exhibits 21 and 22, isn't that true?

A. That is right.

Q. Yes. Now, likewise, in the bill of particulars, the amended bill of particulars on the item, I think it's Item 11, "Loss of Profits," so-called; in determining the loss of profits, the determination is made in the amended bill of particulars by taking the revenue, that is, the scheduled revenue, of April, May and June, minus the revenue that did come in in June, and totaling it and then taking the average per day of the projected revenue during the strike period at 10%, that is the method that is arrived at here; in other words, this projected revenue chart, Exhibit 24, and Plaintiff's 23, was followed precisely as to April, May and June in determining your claim for profits, isn't that true?

A. I don't know as we have a claim for profits.

Q. Well, unless counsel wishes to withdraw it, as I see it, it's about \$64,000, isn't it?

Mr. DeGarmo: I can tell you this, Mr. Etter, I did not examine this witness concerning that item and we are not giving up the question of a mark-up on the cost but we are not claiming it in the same form that [1268] you have asked the question.

Mr. Etter: No; but we have a right to our

(Testimony of Ramon E. Reed.)

theory. You want to keep away from this projected revenue but you want to use it when you charge us with profits.

Mr. DeGarmo: I don't want to keep away from it at all; I am very happy with it.

Mr. Etter: Well, I am, too, so we shouldn't have much of a dispute about it.

(Last question read.)

Mr. Etter: I will start with shorter questions.

Mr. DeGarmo: If you will show him the bill of particulars. You still have to understand that this witness has been out of the country.

The Court: Well, I think you have to take into consideration, too, that the bill of particulars is usually prepared by the attorney working with some witnesses and you didn't work with this one.

Mr. DeGarmo: I am sure I didn't because he wasn't here.

Q. (By Mr. Etter): Now, here is, furnished by bill of particulars, a claim or explaining the method of arriving at a profit. Now, original scheduled revenue for April is \$240,513, that is the same figure as that one, is it not? A. That is right. [1269]

Q. For April? May is \$248,805, is that correct?

A. That is right.

Q. And June, \$213,262, minus actual revenue \$149,072, which follows right here, and here (indicating)? A. That is right.

Q. Isn't that correct? A. That is right.

Q. All right. Then, if you notice the average per

(Testimony of Ramon E. Reed.)

day is reached of the total scheduled revenue, of the actual revenue, and with a net revenue short based upon that strike period, correct?

A. That is right.

Q. From that is a total loss of profit figured at nine days times the net revenue short at 10% or this net revenue, one sixty-four ninety?

A. That is right.

Q. And that is based, is it not, on this projection, which is Exhibit 24, and this Exhibit, which is 23?

A. That is correct.

Q. Now, on the same basis is it not a fact that in December, January, February and March, up until the date of the strike, your scheduled revenue was \$625,179 total scheduled revenue?

A. That is right.

Q. And isn't it a fact that the revenue shortage prior to [1270] the strike, the projected revenue shortage, well, I mean the shortage, at least on the projected scheduled revenue, was \$226,852?

A. That included several days of strike.

Q. All right. Let's say it did. I mean, in March down here through June, or 98 days, includes several days, doesn't it, when there wasn't any strike?

A. Yes, but inefficient days.

Q. Yes, but you asked for that in another one, "Inefficiency Shortage," haven't you? What I am saying, this is a fairly representative figure, maybe a thousand one way or the other?

A. Well, several thousand.

Q. Yes, but made up probably here, wouldn't

(Testimony of Ramon E. Reed.)

it be? All right, but that revenue shortage even before the strike was \$226,000, or a quarter of a million dollars under your estimate during the first four months you were working, isn't that right?

A. Yes.

Q. And yet in projecting, or yet in determining the amount of profit you people are proceeding on the assumption that your scheduled revenue of \$240,513 in April, \$248,805 in May, would all be there and you are basing it on an absolute, isn't that right?

A. Well, there was that number of days that we didn't work [1271] that you should be making a profit.

Q. That you should be making this revenue?

A. Yes.

Q. But you should be making it the first, January, February and March, isn't it true you should be making it then, too? A. Yes.

Q. As a matter of fact you were \$226,000 short?

A. As a matter of fact there are several instances of delays that was making that.

Q. Precisely, but they were not delays the Union caused? A. Not this Union.

Q. There was \$226,000, at least, that you were short in projected revenue on the first four months?

A. In those months that was the best weather in the year, there was no reason why we shouldn't have been back making this revenue.

Q. When you first set this up there wasn't any

(Testimony of Ramon E. Reed.)

reason why you didn't figure that you shouldn't make the first four months, isn't that right?

A. Well, we were scheduled to make it.

Q. Now, you have also testified that after the strike in August and September you had a lot of increased costs and a tremendous, or a difficult time, getting efficient crews together, and one thing and another, isn't that [1272] right?

A. That is right; very correct.

Q. Now, at the end of this strike in July, taking the month of July, your revenue shortage in July on your projection, that is referring again to your exhibit here, 24, your revenue shortage aside from your projected scheduled revenue as it appears here, was \$824,000, wasn't it? A. Yes.

Q. Isn't that right? In other words, over three-fourths of a million dollars you were behind after this strike? A. That is correct.

Q. All right. Now, down here in November of 1956 you had decreased that \$824,000 so that your revenue shortage to date in November of 1956 was only \$292,000, isn't that right? A. Yes.

Q. In other words, you had reduced this entire revenue shortage or, rather, in December or November, in those four months, five months, from \$824,000 to \$292,000? A. Yes.

Q. You did a lot of work in there to reduce that, didn't you? A. Yes.

Q. And to pick up your revenue, isn't that [1273] right? A. Yes; must have.

Q. In other words, you picked up more revenue

(Testimony of Ramon E. Reed.)

in less time after the strike than you ever did before the strike or during the strike? A. No.

Q. Isn't that right?

A. Well, there is a lot of reason why that is.

Q. Well, there may be a lot of reason, but isn't that a fact, isn't that the fact, that your revenue shortage was decreased from \$824,000 to only \$292,000 in November of 1956?

A. There is lots of factors in there.

Q. Will you answer that question; you can explain it? Will you answer that question? Have you done that? A. Yes, sure, we reduced it.

Q. So that as Mr. Carey inquired the other day, these original projections and estimates of yours were just something you hoped had happened, isn't that right, isn't that true?

A. They are something that do happen. I mean, we have a reputation of following schedules, that is why we get the business.

Q. I am talking about this case. You didn't follow the schedule here, did you?

A. We couldn't; we had a strike that delayed us, and [1274] inefficiency.

Q. I don't care about your reputation, the first four months when these defendants had nothing to do with it, it has been brought out that you were a quarter of a million dollars behind.

A. It has been brought out the reason why we were behind, weather, and things over which we had no control.

(Testimony of Ramon E. Reed.)

Q. In looking over those projects do you try to determine what your weather might be?

A. Yes.

Q. I think your weather will show you that you had colder weather this month than you had previously or in '55 or '54, do you know what the weather was?

A. I don't know right now, but it has been checked.

Q. And these other matters that you talked about, for instance, the contamination, you say you didn't determine what the extent of the contamination was?

A. That is something that is hard to determine, Mr. Etter.

Q. Yes, but it was a risk, hazard, when you made this bid, wasn't it?

A. That is correct.

Q. Surely, and you say you ran into some steel construction when you wanted to tie in to some sewer lines?

A. That is right.

Q. Did you examine at all any maps? [1275]

A. Yes; it wasn't shown, it was as much of a surprise to other people as it was to us.

Q. It was not indicated?

A. No.

Q. Have you ever had that happen before?

A. Yes.

Q. You have had that happen before? In other words, aren't these things ordinarily taken into consideration in any bid?

A. No; I don't think so.

(Testimony of Ramon E. Reed.)

Q. I mean, you bid a job with the certainty that the weather is going to be all right?

Mr. DeGarmo: Mr. Etter, will you let the witness answer the question?

The Court: Did you give the witness time to answer?

Q. (By Mr. Etter): Have you completed it?

A. Your weather, you bid on average weather. There is always things that come in at the beginning of a job that you don't figure on, possibly, but you work to make those up later on.

Q. All right, but you want the Court, however, to accept as the fact and not as speculation and conjecture that you would have had this original scheduled revenue coming in every month during April, May and June, although that wasn't the fact for the four months preceding? [1276]

A. In April, May and June we would have had it, April, May and June were the best weather that year.

Q. Your statement is now to his Honor that you absolutely would have had each month, in April, May and June \$240,513, \$248,805 and \$213,262?

A. I wouldn't swear we would have right to that dollar value, but our forces we had organized, we were ready to, we were just where our work was organized and going the way it should. The weather was perfect and we were set up to proceed in an expeditious manner when the strike came.

Q. Those were three important months then, were they?

A. Very important, yes, sir.

(Testimony of Ramon E. Reed.)

Q. And those were three months when it was important that your projected scheduled revenue be coming in? A. Yes.

Q. And your projected scheduled revenue is an important part of this job, isn't that right, meeting the deadlines?

A. Well, your revenue determines the progress you are making.

Q. And so if you had received those amounts in those three months, you would have been making good progress in accord with your projection?

A. That is correct. [1277]

Q. Now, when you were \$824,000 short after the strike and you reduced that to \$292,000 between the end of the strike and November, you were making good progress then, weren't you?

A. Not for several weeks after the strike.

Q. Well, I am talking about the four months, this chart, you said that would be.

A. There was quite a while in that four months that we were not making good progress.

Q. You said if you had attained these amounts that are on your projected scheduled revenue you would be making good progress, that was your testimony?

A. We would have been on schedule.

Q. Now, here in June, although you were \$824,459, you had a revenue shortage of that amount, you reduced that by, actually, about \$552,000, as I see it here.

Mr. DeGarmo: In which month?

(Testimony of Ramon E. Reed.)

Q. (By Mr. Etter): From July to November, the revenue shortage was reduced over half a million dollars, reduced right down; in other words, you made up or, rather, you were making your scheduled and you were picking up on your back?

A. Certainly, we had to, we had to get down or we would face liquidated damages.

Q. In line with your previous testimony, you were making [1278] good progress up until November, in those months?

A. In the former months, not in all those months.

Mr. Etter: That is all.

* * *

RALPH NELSON

called and sworn as a witness on behalf of the plaintiff, [1279] testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you state your full name for the record, please? A. Ralph Nelson.

Q. And where do you presently reside, Mr. Nelson? A. Palmer, Washington.

Q. And where is that, Palmer, Washington?

A. It is about nine miles north of Enumclaw, thirty-five miles from Seattle.

Q. And what is your business or occupation, Mr. Nelson? A. Construction office manager.

(Testimony of Ralph Nelson.)

Q. And where are you presently employed and by what organization?

A. I am employed by Morrison-Knudsen on a project on relocation of the Northern Pacific Railroad. This is a relocation. The reason the railroad is being relocated is on a future dam there at Eagle Gorge on the Green River.

Q. And you are the office manager on that job, are you? A. Yes, sir.

Q. Mr. Nelson, were you at one time the office manager on the Hanford Project job?

A. Yes, sir; I was.

Q. During what period of time did you serve as office [1280] manager of that job?

A. From the beginning of the project in December of 1955 and I closed out the office in Richland in May of '57.

Mr. Carey: Just a minute.

The Court: December of '55 to May of '57?

A. Yes, sir.

Q. (By Mr. DeGarmo): That was, then, the entire period of the performance of that contract?

A. That is right.

Q. Now, Mr. Nelson, will you tell us what background training you have had as an office manager and in that type of work?

A. I started in following two years of business college in 1938. I was employed by Bonneville Power Administration on transmission line and substation construction. I worked in various locations from 1938 to 1940. On most of those jobs I was field clerk

(Testimony of Ralph Nelson.)

on jobs contracted; in other words, the actual work was contracted out. In 1940 I went into the army and returned in 1944. I went back to work for Bonneville for about six months. Then I left them and went to work for Giagutter Electric in Seattle; that was on transmission line construction. The job I was on there was from Arlington, Washington, to Blaine, Washington. That was in 1946 and '47. At the completion of that job I went to work for the [1281] Northwest Packing Company in Portland. I was handling the dog food end of their business, doing the buying of the materials and shipping and warehousing, and in 1948 I went to work for Smith Bros., a Vancouver contractor. I worked until 1951 on various transmission line and road construction projects as field office manager. In 1951 I went into their main office as the accountant. In 1954 I went to work for Morrison-Knudsen as an accountant on the Timothy Meadows project.

Q. Timothy Meadows is in Oregon?

A. In Oregon outside South Estacada, Oregon. In February of '55 I was transferred down to Taft, Oregon, as office manager on a road job for the Bureau of Public Roads. There was a forest access road. I remained on that job as office manager until I was transferred to Richland.

Q. All right. Now, Mr. Nelson, will you tell us in a general way what are the duties of an office manager with Morrison-Knudsen Company on a project such as the Richland project?

A. Basically, we are in charge of payroll and

(Testimony of Ralph Nelson.)

personnel accounting, purchasing and the organization of the office.

Q. Where was the office located, the project office located at the Richland project or the Hanford project?

A. We were located in the Joseph Building in Richland. It [1282] was over the J. C. Penney Company.

Q. Was that where your headquarters were?

A. That was my headquarters, yes.

Q. And who else of the project organization had offices at that same location?

A. Mr. Reed, the project manager, and then I had two women who worked for me.

Q. Will you tell the Court what type of books are kept on a project such as the Hanford project?

A. We maintain a general ledger. It's the regular bookkeeping ledger. As the books of original entry we use what we call a voucher check register. All the checks and the vouchers we write are posted to that and we use what we call a Boise office account journal that is for recording all more or less inter-company transactions.

Q. Was that, generally, the general books of entry?

A. Yes; there are supporting data to those books, yes.

Q. And have you brought with you to court today the books that you have just mentioned?

A. Yes, sir; I have.

Q. For the Hanford project?

A. Yes, sir.

(Testimony of Ralph Nelson.)

Q. And as I understand it, you have a good many other supporting documents which are not in court here, but which are available?

A. Yes, sir. [1283]

Q. Who actually performed the work of keeping these books, Mr. Nelson?

A. I did that myself, yes, sir.

Q. And have the books been in your care and custody since the inception of this job?

A. Yes, sir; they have.

Q. The physical books themselves were taken to the Eagle Gorge project with you, is that correct?

A. Yes, sir.

Q. Mr. Nelson, during the work at the Hanford project did you have occasion at any time to visit the project site?

A. Yes, sir; I did.

Q. You had clearance to the area, did you?

A. Yes, sir.

Q. With what frequency would you go out to the site of the work?

A. Well, ordinarily I would go out at the end of the month; that would be a regular visit to make various checks before I closed out my monthly books, and at other times it would be just if anything came up, I would go out.

Q. Now, were you familiar, Mr. Nelson, with the fact that a strike of the Teamsters and Operating Engineers occurred at this project?

A. Yes, sir.

Q. And as of what date? [1284]

(Testimony of Ralph Nelson.)

A. The strike began March 22 of 1956 and was ended June 6, 1956.

Q. When was work actually started?

The Court: March 22 was the beginning date?

A. Yes, sir.

Q. (By Mr. DeGarmo): And ended June 6? Was there a continued interruption of work which took place immediately after the termination of the Teamsters and Operating Engineers strike?

A. Yes, sir, there was; yes, sir.

Q. What was the occasion or reason for that?

A. Well, the first week we did not have our supervision available. The second week we called for men, on June 11th, the Laborers furnished us a few men, but the Carpenters refused to send any Carpenters to the job.

Q. Then when, in fact, did work actually commence or be resumed after the strike which occurred on March 22? A. June 17.

Q. Of 1956? A. '56, yes. [1285]

* * *

Mr. DeGarmo: Could I have Exhibit 28, Mr. Clerk? [1298]

Q. Mr. Nelson, I am handing you Plaintiff's Exhibit 28; are you familiar with that exhibit (hands paper to witness)? A. Yes, sir.

Q. Now, there are listed on this exhibit, which is headed, "Cost to Employ Men to Pre-level Strike," the names of a number of workmen who it states did terminate their employment due to

(Testimony of Ralph Nelson.)

strike. I want to ask you if those were all of the workmen known to you who did not return to the project and who had been employed on the project prior to the strike? A. Yes, sir.

Q. Now, in the right-hand column is indicated, "Process Time." Will you tell us what is involved in process time?

A. Process time was figured from the time these men reported to our office, we made out the security papers required by the Atomic Energy Commission and then we sent them in to the AEC security office. From there they were sent to the hospital for medical examination, and then when they reported back to our office that was the termination of the process time.

Q. And was there some separate record kept of the process time from which you were able to make up that exhibit? A. Yes, sir. [1299]

Q. Were there instances, Mr. Nelson, where workmen would not be cleared?

A. Yes; it did happen.

Q. Had the workmen who were on the payroll at the time of the strike, the names of whom are listed in the left-hand column on Exhibit 28, already obtained and been cleared through security?

A. Yes, sir.

Q. And had they clearance? A. Yes, sir.

Q. Upon what basis was the time charged, process time; in other words, how did you arrive at the charge for that?

A. It was their hourly rate from the time they

(Testimony of Ralph Nelson.)

reported to our office until they reported back at the end of the medical examination.

Q. Yes. The next item of examination will relate to Item No. 8. Exhibit 29, please. I am handing you, Mr. Nelson, Plaintiff's Exhibit 29 and I would like to ask you with respect to this exhibit from what source is the list of equipment which appears in the left-hand column obtained?

A. From our equipment records and from physical inventory.

Q. Will you state how this equipment record is kept as a part of the company records?

The Court: What is that exhibit? [1300]

Mr. DeGarmo: 29.

The Court: All right, that is in evidence, isn't it?

Mr. DeGarmo: I think it has been admitted.

The Clerk: It has.

The Court: Yes, all right.

A. At the time a piece of equipment is transferred to our job the transferring offices makes out an equipment transfer record and they forward one copy to the receiving contract. We use that to check that the equipment does arrive on the job.

Q. (By Mr. DeGarmo): And when equipment leaves the job, what is done?

A. Well, the procedure is reversed, our office will originate an equipment transfer and forward the transfer itself to the receiving contractor office.

Q. Will you state, Mr. Nelson, if you assisted in the preparation of Plaintiff's Exhibit 29?

A. I worked on that in connection with the

(Testimony of Ralph Nelson.)

equipment that was on the job and the length of time it was on.

Q. All right. From what source, or how did you determine the length of time that the equipment was actually on the project?

A. By referring back to our equipment records, we have the date that it arrived on the job and also the date that it would have left the job. [1301]

Q. Then these figures which appear here as to "Move From Job Site," those would be taken from your equipment records, is that correct?

A. Yes.

Q. Then, in arriving at the amount of rental claimed or the equipment rental claimed, I notice there is stated as AGC and AED; now, are you familiar with the two terms and what they refer to?

A. Yes, sir.

Q. Will you state what is AGC?

A. AGC refers to a rental schedule prepared by the Associated General Contractors.

Q. I am handing you Plaintiff's Exhibit 34 for identification and ask you if you recognize that as one of the AGC construction equipment rental books (hands book to witness)?

A. Yes, sir; it is.

Mr. DeGarmo: I offer this document in evidence at this time.

Mr. Etter: I don't know what to say about that, frankly. As I understand, yesterday you couldn't effect a comparison between that and the prices that appeared here.

(Testimony of Ralph Nelson.)

The Court: I think that was the evidence.

Mr. DeGarmo: That is the other one, but not this one. [1302]

The Court: There is the other one to match up.

Mr. DeGarmo: That is the AED.

Mr. Etter: Well, may I inquire, does the comparison with this jibe with these figures?

Mr. DeGarmo: I would have to ask the witness because this does not list monthly sums as does the AED. This lists a different method of determination.

Q. Mr. Nelson, how do you go about determining a rental rate from an AGC manual?

A. You check the type of equipment and any attachments or anything that would be listed in here and you apply these percentages that are here against the original cost of the equipment.

The Court: Pardon me, I was just going to say, however, while it may not be directly shown, the figures in your Exhibit 29 are computed on the basis of this document, is that correct?

A. Yes, sir.

Q. (By Mr. DeGarmo): I call your attention, Mr. Nelson, to the first sheet of this exhibit and to this language:

“In using this schedule it should be remembered that it contains no element of profit or return sufficient to justify continuous reinvestment in construction equipment for rental to others. The rates shown will [1303] ordinarily

(Testimony of Ralph Nelson.)

not be rates on which a firm renting equipment could exist. A contracting firm desiring to rent its equipment would need to add a ready-to-serve charge to cover its equipment in addition to a profit."

And I will ask you if, in making your computations for Plaintiff's Exhibit 34, you did, in fact, add anything to rates for overhead and profit on the AGC computed equipment?

The Court: What is the number of that one?

Mr. DeGarmo: I again offer it.

The Court: I think it should be admitted to show the basis of the computation.

Mr. DeGarmo: That is the only purpose of it.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 34.)

Q. (By Mr. DeGarmo): And will you state, Mr. Nelson, what is meant by AED?

A. That is the Associated Equipment Dealers.

The Court: Let's see, what is the number of that exhibit?

Mr. DeGarmo: 35.

The Clerk: 34 just admitted.

Mr. DeGarmo: That is right; this is 35.

Q. Are you familiar with the AED book, rental books, Mr. [1304] Nelson?

A. I have used it in my work.

Q. Have you been on jobs where equipment has been rented under AED schedules?

(Testimony of Ralph Nelson.)

A. Yes, sir.

Q. And have you been on jobs rented under it, I mean, rented by the person for whom you were working?

A. Yes, sir.

Q. And have you been on jobs where equipment has been rented to others under the AED rental?

A. Yes, sir; I have.

Q. I am handing you what is marked as Plaintiff's Exhibit 35 for identification and ask you if you recognize that as a 1956 AED rental book (hands book to the witness)?

A. Yes, sir; it is.

Q. Can you tell us what book was used as to year in the computation of the rentals as shown on Plaintiff's Exhibit 29?

A. That would have been the 1955 edition.

Q. Approximately when in the year do the books for the current year come out, that is, the year with the current date on it?

A. Oh, I would say probably around in June, or a little later. [1305]

Q. So that in 1956 you could not have an '56 book until some time in the latter part of the year?

A. That is right.

Q. Now, in the AED equipment rental books, is there any statement made as to the basis for the charge which is there shown?

A. Well, these are average rates generally charged by equipment dealers throughout the country.

(Testimony of Ralph Nelson.)

Q. May I have the book for just a minute? I call your attention to the following statement which appears on page, well, it is not a numbered page, but it is the page immediately following the foreword in Plaintiff's Exhibit 35 for identification, reading:

“Rentals are payable in advance and subject to the terms and conditions of the lessor's rental contract. No insurance, license, sale or use taxes are included in these rates.”

The Court: What was that last item?

Q. (By Mr. DeGarmo): “No insurance, license, sale or use taxes are included in these rates,” and I wish to ask you if in preparing Plaintiff's Exhibit 29 there was any addition made to the basic AED rates for the items which the volume states are not included in the rental rates?

A. No, sir; there was none.

Q. So that the figures which appear in Plaintiff's Exhibit [1306] 29 would not include any insurance, license or other items than the basic cost?

A. No, sir.

Mr. DeGarmo: Or the basic rental rate, rather? I offer this document only for the purpose of showing the basis upon which the rentals are computed.

Mr. Carey: What is that number?

Mr. DeGarmo: This is 35.

The Court: I suppose there is some difference be-

(Testimony of Ralph Nelson.)

tween '55 and '56. The only statements that were made here is that this is slightly higher.

Mr. DeGarmo: I will have some further testimony. This is higher.

The Court: Well, it will be admitted for the purpose of showing the general basis of your computations.

Mr. DeGarmo: We would like to make our computations under this because we get more money, but I think we are already stuck with the other.

Mr. Carey: We think you are stuck with your own list.

Mr. DeGarmo: Well, we will argue that when we get to it.

The Clerk: Plaintiff's 35.

The Court: 35 is admitted, then.

(Whereupon, said document was [1307] admitted as Plaintiff's Exhibit No. 35.)

Q. (By Mr. DeGarmo): There is one further figure on here that I want to call to your attention, Mr. Nelson, for an explanation on the last column on the first page, and two items under "Move-In Cost," will you tell us from what source those figures came, if you know?

The Court: Let's see, what is that number again, please?

Mr. DeGarmo: It's 29; it's on the first page.

The Court: I know what he refers to.

Mr. DeGarmo: In the last column.

(Testimony of Ralph Nelson.)

Q. Well, the particular two figures which I refer to are in the right-hand column on the first page, there are just two figures in that column which make it the total of seven hundred seventy.

A. Those figures would have been taken from the voucher which was prepared in payment of the bill of the firm which moved this crane in.

Q. Was it moved in by your own men or by someone else?

A. No, sir; I would have to check, but I believe it was Wilhelm Trucking Company, from Portland.

Q. Well, then, that would represent the actual cost figure of move-in? A. Yes, sir. [1308]

Q. And when it was moved out, who moved it out? A. I believe it was the same firm.

Q. Do you know, Mr. Nelson, where that came from to the Hanford project?

A. It came from Estacada, Oregon.

Q. And at what time did it arrive, with respect to the commencement of the strike?

A. It was just immediately before the strike, I believe.

Q. And for what period of time was the equipment held there at the project awaiting the end of the strike? May I have that exhibit again, please? A. It was shipped June 25, 1956.

Q. That is to go back to where?

A. No; I have the wrong one, May 23rd.

Q. And that is the date shown here on Exhibit 29 as the move-out date? A. Yes, sir.

(Testimony of Ralph Nelson.)

Q. Do you recall, Mr. Nelson, when this exhibit covering the rental of equipment was originally prepared?

A. It was either right during the time at the latter part of the strike or immediately after.

Q. Now, there has been a change made in the second page of the exhibit, do you recall and can you explain what that change was from the way it was originally prepared?

A. Yes. Originally, we had under the item of "Uniform [1309] Concrete Form Panels," we had listed 17,500 square feet, roughly, 7,500 of those feet had been rented from an equipment dealer from Seattle and we removed that from here.

Q. And where did the rental on those forms appear elsewhere in the claim?

A. Under Item 16.

Q. And was that something that came to light when the accountants for the defendants were examining the records?

A. Yes, sir.

Q. And the exhibit was then corrected, is that right?

A. Yes.

Q. Mr. Nelson, in the claim as originally submitted by Morrison-Knudsen Company to the defendants was included an item for liquidated damages, are you familiar with the fact that that claim was later eliminated?

A. Yes, sir; I am.

Q. As the office manager of the project, are you familiar with when extensions of time are ultimately obtained which resulted in the elimination

(Testimony of Ralph Nelson.)

of the liquidated damage item? A. Yes, sir.

Q. Can you state when that was?

A. Do you mean when we actually received the extensions?

Q. When it was determined that extensions would be granted [1310] which could eliminate any claim for liquidated damages?

A. That was right at the end of the job, it would have been in April or May of '57.

Q. Are those extensions given in the form of a modification or change to the contract?

A. Yes, sir.

Q. Mr. Nelson, Mr. Reed had departed from the project at the time substantial completion was accomplished of the 100-H area; can you tell from your records when substantial completion of that area was accomplished?

A. April 18, 1957. [1311]

* * *

Mr. DeGarmo: The next testimony of the witness will relate to Item No. 16. May I have Plaintiff's Exhibit [1320] 33, please? Has this exhibit been admitted, Mr. Clerk?

The Clerk: No, sir.

The Court: No; it hasn't.

Q. (By Mr. DeGarmo): I am handing you Plaintiff's Exhibit 33 for identification, Mr. Nelson. Will you state if you assisted in the preparation of that exhibit (hands paper to witness)?

(Testimony of Ralph Nelson.)

A. Yes, sir; I did.

Q. And just for the purpose of the record, will you state what the exhibit covers, just generally?

A. This covers the labor cost and supply cost of our concrete items.

Q. On the first sheet of the exhibit under the heading of "100-F Area" appears "Labor Cost to March 31, 1956, \$51,417.85." Will you state the source from which you obtained the figure of \$51,417.85?

A. From our general ledger.

Q. Well, now, will you explain to the Court and to counsel how you are able to determine what your labor cost is as to a particular item of work?

A. Every man on our job under an hourly pay rate submits a time card each day showing how many hours he has worked. The foreman in charge of that particular crew that this man is working on breaks his working time down into so many hours spent on each item. We used the [1321] time cards to prepare our payroll and every day we used the foreman's report, which is what the foreman consolidates the time cards for his crew on, and make a breakdown of the cost, daily cost, for each piece of work that that crew or that particular man has done.

Q. Now, does your construction project ledger contain this breakdown as a part of the permanent records of the job?

A. Yes, sir.

Q. So that these individual cards that the workmen keep, turned over to the foreman, consolidated

(Testimony of Ralph Nelson.)

by him and turned into the office, ultimately find their way into the permanent bookkeeping records?

A. Yes, sir.

Q. And was it from that source that you determined the \$51,417.85 as of March 31, 1957?

A. Yes, sir.

Q. Then there appears a figure of 1,810 cubic yards of concrete poured. Can you tell us from where that figure came?

A. That figure came from a breakdown of the revenue that we received for that period of time up through March 31.

Q. And how do you determine what revenue is received for a particular item?

A. From our partial payment estimate.

Q. Then we have a labor cost to September 30, 1956, of [1322] \$140,889.43. Would that figure be obtained in the same manner as the first figure?

A. Yes, sir.

Q. Now, to go back a step, you have shown here \$28.41 as the cost per cubic yard of concrete poured to March 31, 1956. How did you arrive at that precise figure?

A. By dividing \$51,417.85 by 1,810 yards.

Q. In other words, the total cost by the yardage poured?

A. Yes, sir.

Q. Produced the average cubic yard cost?

A. Yes, sir.

Q. All right. Then you have in this exhibit done what next?

(Testimony of Ralph Nelson.)

A. I subtracted \$51,417.85 from the \$140,889.43 to arrive at a labor cost from March 31 to September 30 of \$89,471.58.

Q. Now, as a matter of fact, no concrete was poured subsequent to the 22nd of March, was it?

A. No, sir.

Q. But the month end figures would show any concrete poured up to that date, including that poured prior to the 22nd of March?

A. Yes, sir.

Q. All right. And then what did you do, you obtained after you got your figure of \$89,471.58, the cost of [1323] labor for pouring concrete between June 6, 1956, and September 30, 1956.

A. And I divided that figure by 2,253 cubic yards.

Q. And, again, how did you get the 2,253 cubic yards? A. From our concrete records.

Q. And was the \$39.71 per cubic yard obtained in the same manner by dividing the total cost for the period by the yardage poured in the period?

A. Yes, sir.

Q. And then what did you do?

A. Arrived at an excess cost of labor, a difference of \$11.30.

Q. What does that represent?

A. That represents the difference in labor cost between the periods before the strike and after the strike up through September 30.

Q. And then you did what in order to arrive at a claim figure?

(Testimony of Ralph Nelson.)

A. That figure was multiplied by 2,253 cubic yards to show an excess cost for that period.

Q. Well, now, was the 2,253 cubic yards the concrete that was poured between the end of the strike and September 30? A. Yes, sir.

Q. Then you have a similar computation shown here for 100-H area. Does the same explanation apply to that area as to [1324] the 100-F and the explanation that you have just given?

A. Yes, sir.

Q. Let me ask you, Mr. Nelson, if you can, I note on this exhibit that the cubic yard cost prior to the strike on the 100-F area was \$28.41, whereas, the cubic yard cost on the 100-H area was \$28.91. Do you have any information as to why one would be larger than the other?

A. No, sir; I don't.

Q. You are not familiar with the reasons? You do know that that is what the figure shows?

A. Yes, sir.

Q. All right. Now, let's take the second sheet of the exhibit and will you tell us what the second sheet relates to?

A. This is our supply cost on concrete.

Q. Now, there was a question raised here yesterday as to what is included in supply cost or in supplies for concrete. Can you detail that with a little particularity?

A. Well, supplies would be your lumber on this job, there was the uniform panels, the rental of those would be included as a supply cost; nails,

(Testimony of Ralph Nelson.)

forms, oil, Hunts process oil, and your tie rods, and all the various hardware you use in your forms, small tools like vibrators, and the cost to the job of those, or any gasoline or Diesel that might have been in use in connection with [1325] this concrete, that would all be supplies.

Q. All right. Let me ask you, Mr. Nelson, in the keeping of your books and accounts and records, of this project, did you segregate supplies as to items the same as you did, that is, materials and supplies to items of work the same as you did labor? A. Yes, sir.

Q. So that you have a separate bookkeeping account of the materials and supplies which were purchased and used in connection with concrete as distinguished from structural steel and some of the other bid items? A. Yes, sir.

Q. And was it from that source that you obtained the figures which appear here?

A. Yes, sir.

Q. All right, so that if we wanted a complete detail of what was included under "Miscellaneous Small Tools," and so forth, we could go to the books and find what that related to, is that correct?

A. Yes; it would refer to where the supporting data was.

The Court: That account is, obviously, separate as to the two areas, too? A. Yes, sir.

Q. (By Mr. DeGarmo): So that it is not only segregated as to the item but as to the 100-F and 100-H areas? [1326] A. Yes, sir.

(Testimony of Ralph Nelson.)

Q. All right. The first item "Uniform Rental and Supplies," will you tell us what that, in general, covers?

A. Well, that would be the rental of the uniforms, itself, and the miscellaneous hardware.

Q. Well, now, by "uniforms," you don't mean the kind that you would put on and wear?

A. No, sir.

Q. What do you mean?

A. That was the steel forms with a plywood face that we used.

Q. Used for the purpose of holding the concrete during the pour? A. Yes, sir.

Q. All right. And then they are stripped after the pour and used again? A. Yes, sir.

Q. And from what source did you obtain the \$21,866.43?

A. From the general ledger for those items.

Q. Then we next have lumber.

The Court: Pardon me, Mr. Nelson, was that item of rental actually paid out or was it computed on the basis of rental value of the forms?

A. Part of it would be on the forms that we had rented.

The Court: You rented some and others you purchased [1327] or made yourself?

A. Yes, they were job purchased forms and we wrote them off at so much a square foot per month.

The Court: I see.

Q. (By Mr. DeGarmo): Then, we have lumber

(Testimony of Ralph Nelson.)

prefabrication forms \$1,712.14, would you state what that item covers?

A. That would include lumber for the job-built forms.

Q. Did you build some of the forms on this job rather than rent them? A. Yes, sir.

Q. And would that figure also come from the bookkeeping records of the corporation?

A. Yes, sir.

Q. And then we have scaffolding materials, what does that cover, or is that obvious?

A. That includes the supplies and the scaffolding that was used regarding the forms.

Q. Did you rent some scaffolding in connection with this project?

A. Yes, sir, some was rented.

Q. And that would include, then, both the rented scaffolding and that which was built out of lumber on the job? A. Yes, sir.

Q. Then, you have miscellaneous small tools, and so forth. Now, there was some comment yesterday that \$5,417.55 [1328] seemed a rather sizable item. Will you tell us what is included in that item, and if you need to refer to your detail in your books to cover it any better, do so.

A. Well, there could be form oil in there, or just Hunt's process oil.

Q. Now, what do you mean by "form oil"?

A. Oil that is painted on the forms to keep the concrete from sticking to the forms.

(Testimony of Ralph Nelson.)

Q. All right. And what is this Hunt's process oil that you are talking about?

A. I believe that is a curing agent, I am not sure. I know it by the name, I don't actually know what it is.

Q. You see the invoices all the time?

A. Yes, sir.

Q. All right, what else?

A. Any cost we would have in connection with small tools, vibrators and finishing machines, or anything like that. It might be Diesel or gas used in equipment that was used on this work, anything of that nature.

Q. And, again, is that figure reflected on the bookkeeping records of the corporation?

A. Yes, sir.

Q. And charged to this particular area of the work?

A. Yes, sir.

Q. Then we have "Strip Miscellaneous Tools, \$106.26," what [1329] would that relate to?

A. Oh, that would relate to some small tools that were used in stripping the forms.

Q. I notice without getting into 100-H too far, that in the case of 100-F we have \$106.20 under that item, whereas with H, it's only \$1.87. Can you tell use why that might be?

A. Yes, on small tools we write them off on the first job that they are used on; in other words, here probably the same tools were used in both areas but they were used first in 100-F, so therefore, they were wrote off on that.

(Testimony of Ralph Nelson.)

Q. Wrote off against that job and not against the second one? A. Yes.

Q. All right. Now, having listed those items you come up with what?

A. Our total supply cost of \$38,557.01.

Q. Now, at this point, Mr. Nelson, let's ask a question that Mr. Etter was curious about yesterday: Why in the case of the materials, did you not use the material cost to March 30 and then start again with your material cost after that date?

A. Under "Supplies" you have so much stuff that there is use on, your form materials, lumber, and so on. You use [1330] them over and over again. The longer you use them the less your supply cost will be.

Q. Well, from an accounting standpoint is it possible to break this item as of March 30 as you did the direct labor?

A. I could break it up, I could tell you what figure I had at that time, but it wouldn't mean anything. In other words, we may have gotten one use out of our lumber and later on we used it more times. It would have shown a high supply figure at that point. We didn't have as many reuses out of it.

Q. Well, from the standpoint of accounting is this method of using the total period more accurate than if you tried to make some arbitrary break as to March 22nd? A. Yes.

Q. All right. Now, the next figure which appears here is one for total yardage poured of 4168 cubic yards. From what source did that figure come?

(Testimony of Ralph Nelson.)

A. That is a figure of the actual concrete that we purchased from the Atomic Energy Commission for that area.

Q. And would that be a figure that would be obtainable from your books, or, at least, from the payment estimate? A. Yes; yes, sir.

Q. Again, did you keep a record of the concrete poured with respect to each of the areas, the 100-F and 100-H? [1331] A. Yes, sir.

Q. Then, from what source then came the estimated cost per cubic yard which shows on 100-F area as \$6.10? A. From the bid documents.

Q. Now, you did not assist in the preparation of the bid documents? A. No, sir.

Q. And you did have access, however, to the bid documents? A. Yes, sir.

Q. And then what did you do to obtain the figure of \$25,424.80?

A. Multiplied 4168 cubic yards by \$6.10.

Q. And then what was the next mathematical process that you used in this exhibit?

A. Subtracting \$25,424.80 from the \$38,557.01.

Q. And what did that produce and what does it mean?

A. It produced a figure of \$13,132.21 which, based on our original estimate of the \$6.10, was the additional cost per yard, or additional cost based on the total number of yards we had poured.

Q. Now, again, without going into detail as to every item in the 100-H area, does the same or was

(Testimony of Ralph Nelson.)

the same method of obtaining the figures and making the computations used?

A. Yes, sir. [1332]

Q. There was a change, was there not, Mr. Nelson, in this exhibit at a later date, subsequent to the filing of the amended bill of particulars?

A. Yes, sir, there was.

Q. Will you tell the Court and counsel what occasioned it, what occasioned that change?

A. There had been some material which we had purchased and was not used which we had returned to the vendor and afterwards we received credit.

Q. And is that reflected in these two items of credit shown under the 100-H area of \$837.29 and \$5.77?

A. Yes, sir.

Q. That reduced the amount of the claim then?

A. Yes, sir.

Q. And was it also found, was there a change in the total cubic yardage poured?

A. Yes, sir, at the time that this had been originally prepared I was in the Seattle office and I didn't have all my records with me. At the end of September there was a slight difference. I think someone had stuck the pour slips in their pocket and I didn't discover that my figures were wrong until after I closed out my books for the month.

Q. And did that result in a slight change in the cubic yardage poured? [1333]

A. Yes, sir.

Q. And then what was found to be excess costs in the 100-H area subsequent to the strike?

A. \$8,949.86.

(Testimony of Ralph Nelson.)

Q. Now, there is a third sheet to this, would you state what the third sheet is?

A. That is just a recapitulation of these items which were broken down on the other two pages.

Mr. DeGarmo: I now offer Plaintiff's Exhibit 33.

The Court: It will be admitted.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 33.)

Q. (By Mr. DeGarmo): Mr. Nelson, do you have any personal knowledge as to why the material costs which were incurred on this job in connection with the pouring of concrete exceeded those which had been estimated for the job?

A. No, I wouldn't ordinarily have that information in my position. I was in the office; I would leave that determination to others.

The Court: I think you said you didn't assist in the preparation of the bids? A. Yes, sir.

The Clerk: Marking Plaintiff's 49.

(Whereupon, Plaintiff's Exhibit No. 49 was marked for identification.) [1334]

The Clerk: I will find it a little later, Mr. Nelson.

Q. (By Mr. DeGarmo): I think I am using Mr. Nelson more as a vehicle to identify than anything else. Mr. Nelson, I am handing you that which has been marked as Plaintiff's Exhibit 49 for identification. Will you state just generally what this exhibit is without detailing the figures (hands paper to witness)?

(Testimony of Ralph Nelson.)

A. This is headed up "Loss of Profits."

Q. Now, the items which are listed there are just the items which are included in the claim in this case?

A. Yes, sir.

Q. And I believe there has been evidence that has related to each of these items except the amount of the legal expense, is that your recollection?

A. Yes, sir.

Q. Then, at the bottom of the page, under Item 11 appears an item of 10% mark-up, what does that represent, Mr. Nelson?

A. That represents a mark-up on \$165,923.43, which would be the total of Items, 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16 and 17.

Q. Now, why is the figure of 10% used, if you know, Mr. Nelson?

A. Well, that is more or less a standard figure in the [1335] construction industry.

Mr. DeGarmo: I have no further questions of this witness at this time. You may examine. I did not offer that last exhibit because I will have further testimony.

The Court: I notice you didn't. [1336]

Cross-Examination

By Mr. Etter:

* * *

Q. Now, calling your attention here to Exhibit 29, have you that in front of you yet? No; here it is right here.

The Court: Yes; I have it here. [1340]

(Testimony of Ralph Nelson.)

Q. (By Mr. Etter): Here it is, Mr. Nelson (hands paper to witness), and that has regard to Item—now, where is my book, Item 8; oh, yes, equipment rentals. Now, as I understand, these are rentals that were arrived at by you in the use of the two books, that is, the manuals; I don't know what exhibits those are, offhand.

The Clerk: 34 and 35.

Q. (By Mr. Etter): 34 and 35, that is AGC and the AED manuals that you explained?

A. Yes.

Q. Now, were you keeping the records during your work as an accountant for the company during the time of the strike? A. Yes, sir.

Q. You were? And have you been in charge of the records the past several months?

A. Yes, sir.

Q. And you talked with Mr. George King, did you not, certified public accountant, who you allowed to check your books on behalf of the defendants? A. Yes, sir.

Q. And you made available to him, as I understand, these books and records such as he required for his perusal and examination?

A. Yes, sir. [1341]

Q. And on certain items I assume that you people talked a little bit about them? A. Yes.

Q. Is that right?

The Court: I didn't get the name of your accountant?

Mr. Etter: Mr. George King, of Morris & Lee.

(Testimony of Ralph Nelson.)

The Court: I see, all right.

Q. (By Mr. Etter): Now, on these rentals this rental per unit per month, did you or do you show in your books or your records with respect to this job or in the records that were made available to Mr. King, or did you discuss with him, was there anything in your records that showed that Morrison-Knudsen paid any of these rentals that are listed on Exhibit 29?

A. You mean, paid to some outside source?

Q. Yes.

A. I don't know; there wouldn't be anything that is remaining on this list as of now.

Q. No, but I mean looking, for instance, three-quarter ton pickup at the top there, rental per month, \$135; equipment rental on the job, \$270. Do your records indicate Morrison-Knudsen paid that?

A. No.

Q. They didn't rent this equipment and pay that price for [1342] it? A. No, sir.

Q. They did not? Do your books indicate at the present time aside from this lawsuit, and I am referring only to the job, do your books indicate any place a charge against the job of a cost item with reference to this same three-quarter ton pickup of \$270?

Mr. DeGarmo: Just a minute, Mr. Nelson. At this time, if your Honor please, I want to renew the objection which I made yesterday with respect to evidence of what internal auditing charges may have been made by Morrison-Knudsen Company

(Testimony of Ralph Nelson.)

between projects. I don't care to argue it again, I just want the record to show the objection and may it be continued as to each question that relates to that item?

The Court: Well, I will overrule the objection but please don't think that I am making a decision regarding it or I am drawing any conclusion. I will simply let it in here and then decide later on what the effect will be.

Mr. Etter: With regard, of course, to the other internal operations that counsel has used in determining or claiming his liability, their 4% override on money and their 10%, this which is internal.

Mr. DeGarmo: It is not internal; it's external.

Mr. Etter: You seem to want the internal ones that [1343] are a profit but you don't want these, counsel, if I can make that observation.

The Court: I will overrule that objection. Your answer was that you do not know?

A. I believe he asked at the last whether this \$270 had actually been paid to someone. My answer was "no."

Q. (By Mr. Etter): I will ask you whether or not in your records that you showed as Mr. King as indicative of the job records, whether you show apart from this lawsuit, whether you showed any charge to this job of an expense of \$270, as indicated for that three-quarter ton pickup?

A. No, sir.

Q. Now, isn't this true, with respect to all of the items that appear on this Exhibit 29?

(Testimony of Ralph Nelson.)

A. Yes, sir; that is right.

Q. And, as a matter of fact, this \$27,000 total that appears on the second sheet, that was not a cost item charged to this job, was it? A. No.

Q. Beg your pardon?

A. No; it wouldn't have been.

Q. It wasn't? Now, do you know how much money Morrison-Knudsen lost on this job?

A. Yes.

Q. How much? [1344]

A. As of December 31, 1957.

The Court: December 31?

A. Yes, 1957, the loss is indicated as \$322,196.93.

Q. (By Mr. Etter): \$322,196, and some odd cents? A. Yes.

Q. All right. Can you tell me whether or not in the loss that Morrison-Knudsen has sustained in the amount that you have just set forth, can you tell me whether or not that loss includes the \$27,000 that is listed as a charge on this Exhibit 29?

A. No, sir; it does not.

Q. It does not? Now, this job cost when this job was estimated was the \$27,000 total on Exhibit 29, was that used in cost estimate for this job as being the cost in that amount?

A. Well, there was equipment rental figured; I wouldn't say.

Q. Well, was it this amount?

A. There wouldn't be this figure, no.

Q. Well, you have had charge of the books?

A. Yes, sir.

(Testimony of Ralph Nelson.)

Q. Do you know how much you have charged on your books to equipment rental?

A. Yes, sir.

Q. Will you tell me? [1345]

A. (Witness refers to file): \$14,096.69, that is major equipment.

Q. You have charged \$14,000, you say?

A. Yes, sir.

Q. As equipment rental? A. Yes, sir.

Q. And that fourteen thousand that you have charged as equipment rental, does that have reference only to the items that are on this sheet, or does it include additional items?

A. Well, it would include equipment on the job during the life of the job.

The Court: That is for the full time of the job, I understand?

A. Yes; in other words, at the beginning or before or after the strike the equipment on the job wouldn't necessarily be this same equipment.

Q. (By Mr. Etter): It wouldn't necessarily be this same equipment? What I am trying to determine, however, is can you tell me, or have you had a chance to determine what the charges to the job of the equipment listed on Exhibit 29 actually was, not what you have listed here as the rental charge, if it was secured from AGC and AED rental figures, can you tell me what the actual cost of these items was as it appears in your contract? [1346]

A. Do you mean on AEC?

Q. No, all the items here, do you know what the

(Testimony of Ralph Nelson.)

charge made to the contract was on these items, the actual charge that Morrison-Knudsen made?

A. Do you mean on the whole job?

Q. No, for the period covered by the time of the strike.

The Court: Well, it wouldn't be on your books in that form?

A. No, it wouldn't be on the books in this form.

Q. (By Mr. Etter): Could you determine what pro rata charge as it actually appears on your books would be during this period? A. Yes.

Q. You have not done that, though?

A. No.

Q. I see. Do you know whether Mr. King did that while he was there? A. I don't know.

Q. You don't know? Did he discuss it with you?

A. I don't believe so.

Q. You don't believe so? Can you tell me whether or not in any of the cost accounting or cost charged to the job or final wind-up, or any part of the figures that apply to profit, loss, cost or otherwise, on this job, can you tell me whether apart from this lawsuit there [1347] are any charges of any nature indicated in the same fashion and at the same rate as appears in Exhibit 29 for the equipment listed?

A. No, there wouldn't be.

Q. Now, you also stated with respect to this exhibit, which is 29 again, I think you said that, and I am referring now to the total of the cost of two items which appear to the extreme right on the first page, a move-in cost, a total of which two items

(Testimony of Ralph Nelson.)

is carried forward on the second page in the amount of \$770.17, do you find that? A. Yes, sir.

Q. I think your testimony was that there was a voucher chargeable to this job on the move-out of that piece of equipment? A. Yes, sir.

Q. Or the move-in, rather?

A. Yes, sir, there would be.

Q. I think you said there was on the move-in?

A. Yes.

Q. Well, now, is that voucher chargeable to the job that you know of for the \$770.17, which is also charged as a move-out?

A. I would have to do some checking on that.

The Court: I am not sure that I have the item that you are referring to here. [1348]

Mr. Etter: Your Honor, it's on that attached sheet.

The Court: On the attached sheet?

Mr. Etter: Right over at the corner there are two and one is a move-in of \$770.17, and right below it is a move-out.

The Court: Yes, I know.

Mr. Etter: And it has "Estimated" after it.

The Court: I see.

A. No, sir. When that piece of equipment was moved out it was sent out collect; in other words, the other job would have paid for that.

Q. (By Mr. Etter): And it was not charged against your contract? A. No.

The Court: Let's see, this same piece of equipment, of course, I think the testimony was that it

(Testimony of Ralph Nelson.)

came in there just before the strike and was kept and then sent away right after or toward the end of the strike?

Mr. Etter: That is correct.

The Court: But rental was charged on it on the first page of Exhibit 29, was it not, isn't that the same item, NC-414, Marine Motor Crane?

Mr. Etter: That is correct.

Q. Now, with respect to Item 11, as I understand what you said, there is a mark-up of 15% above the direct cost [1349] for overhead, plus then a 10% mark-up of the direct cost and the 15% as before profit?

A. Yes, sir.

Q. Now, was this contract bid, would you say, with regard to that formula?

A. I didn't assist in the bidding; I assume it would be.

Q. Well, would you know of any other way that it would be bid?

A. No, I don't.

Q. You do not? So that would it be proper to assume, looking at Exhibits 21 and 22, first we will take 21, looking down there at the total estimate of \$908,380, could we reasonably assume that that \$908,000, and \$380,000 was a figure of Morrison-Knudsen Company's which composed the direct cost plus 15% overhead plus 10% of the direct cost and overhead in that total?

A. In that total would be the direct cost plus overhead plus profit; I don't know what the exact figures would be.

Q. In that \$908,000? No, I don't mean the exact

(Testimony of Ralph Nelson.)

figures, but would we be right in assuming that that sum total was a combination of direct cost, overhead and 10% cost under the formula suggested by you?

A. Yes, sir.

Q. And then looking again at 22, Exhibit 22, we find a [1350] figure there of \$868,000; could we reasonably assume, likewise, that that figure in 22 included direct cost, overhead, and 10% profit on the two?

A. Yes, sir.

Q. All right, so that now actually, as you say, the job itself lost, I think your testimony was, about \$322,196, is that correct?

A. Yes, sir.

Q. And although Item 11, which Mr. DeGarmo has handed us, is not in evidence and I don't know whether you have seen it, it indicates a total claim now as far as this litigation is concerned, of about \$182,500 against these defendants. Now, having that in mind, even assuming the \$182,000 was available to the plaintiff or was subtracted, let us put it, from the total of loss, this contract in any event, on the basis of those figures, would have cost about \$142,000, anyway, wouldn't it?

A. Yes, on that basis, yes.

Q. That is right. So that actually, taking this bid of yours, or the bid, not of yours but of the company's, say, as indicated by Exhibits 21 and 22 as including an estimate made by Morrison-Knudsen, experienced contractors, apparently, of direct cost, overhead of 15%, profit of 10%, still lost, excluding the claimed amount against the Unions, about \$140,000? [1351]

(Testimony of Ralph Nelson.)

A. Yes, that is right.

Q. Isn't that correct? A. Yes, sir.

Q. Or, in other words, their bid even with the 15% and the 10% on top of the direct cost, still showed 8% more in loss over and above that, isn't that right? A. That is right.

The Court: We will take a ten minute recess.

Mr. Etter: All right, your Honor.

(Whereupon, a recess was taken for a period of ten minutes.)

Q. (By Mr. Etter): You are aware, are you, Mr. Nelson, that in the bill of particulars, the amended bill of particulars, the loss of profits was claimed as \$64,190, while on this exhibit for identification, which is not yet in evidence, the loss of profit has been reduced to \$16,592?

A. Yes, I saw that on that exhibit.

Q. A reduction of some \$48,000?

A. Yes, sir.

The Court: What exhibit do you have now?

Mr. Etter: Well, I don't think it's in yet.

The Court: I have a copy of it though, probably.

Mr. Carey: It's identified as 49.

Mr. Etter: 49. [1352]

The Court: That item of \$16,592?

Mr. Etter: I was calling Mr. Nelson's attention to the twice amended item, now \$16,592, as compared to \$64,000 that was claimed in the amended bill of particulars.

Q. Now, Mr. Nelson, getting down here to Item

(Testimony of Ralph Nelson.)

16, I would like to inquire about that item, if I may. In speaking here of the 100-F area on the first page, have you that Exhibit 33 or have you a copy of it there?

A. I have a copy of it which I believe is the same.

Q. Here is 33, or you can use this if you wish, it's the same one (hands paper to witness), I believe, is it not?

Mr. DeGarmo: I didn't get the question, Mr. Etter.

Mr. Etter: I haven't asked one yet.

The Court: He handed him Exhibit 33.

Q. (By Mr. Etter): You have that Exhibit 33?

A. Yes, sir.

Q. Now, I notice that you have on the 100-F area labor cost to March 31, 1956, and underneath that 1810 cubic yards poured, is that correct?

A. Yes, sir.

Q. Now, can you tell me whether that is the actual pour or is the amount of pour that was billed to the AEC?

A. That was the amount that the AEC and our engineer established to cover the amount of work that we had in [1353] place under that concrete item.

Q. Yes. In other words, it actually isn't the amount of concrete poured, is it? A. No.

Q. In other words, your books reflect a lesser amount of pour than that?

(Testimony of Ralph Nelson.)

A. As far as my record of the concrete that had been delivered.

Q. In other words, if the forms were in place under the arrangement you can build them as and for concrete poured? A. Yes.

Q. So that this 1810 cubic yards poured actually isn't definitely, I mean, it isn't definite that that amount was poured, actually?

A. No, it hadn't been actually poured.

Q. It hadn't been actually poured, but billed?

A. Yes.

Q. Now, looking down on that same 100-F area "Labor Cost 6/6/56 to 9/30/56, 2253 cubic yards poured." Now, that is, likewise, true is it not, that that amount is the amount billed but wouldn't necessarily have to be the amount poured?

A. At that point it was the amount that had actually been poured. In other words, there had been no forming [1354] ahead of it, so that is the actual amount.

Q. That is an actual amount of pour, is that correct? A. That is right.

The Court: What was that last item referred to?

Mr. Etter: The last item, your Honor, is in the same column referring to the 100-F area.

The Court: 2253, yes, I see.

Mr. Etter: Yes.

The Court: Yes, all right.

Q. (By Mr. Etter): Now, actually, or then looking down there at the 100-H area again, or I mean just below the 100-F area, I refer now to the item

(Testimony of Ralph Nelson.)

which you have of 1440 cubic yards poured, can you tell me whether that amount was poured or is that the amount billed?

A. That was the amount that we were paid for.

Q. That is the amount that you were paid for? Can you tell me actually, as to both those items, what the amount of yards poured was, without too much trouble, Mr. Nelson?

A. The Concrete deliveries up to those points in the 100-F area had been 1619½ cubic yards, and in the 100-H area, 1266 cubic yards.

Q. Thank you. Now, in that exhibit, referring back again to Exhibit 33, you have determined a cost, as I see it there, a labor cost of \$28.41 per cubic yard up until March 31? [1355]

A. Yes, sir.

Q. Under the formula that you explained to us?

A. Yes, sir.

Q. Now, when this contract was bid there would be a bid estimate, wouldn't there, of the expected or probable, possible, whatever it might be, cost per cubic yard for pouring?

A. Yes, our engineers would have.

Q. Have you that record; can you tell me what the bid estimate per cubic yard was with respect to the 100-F area and particularly with respect to the yards poured prior to March 31?

A. Well, I have a document here, I don't know how right it is, but for the 100-F there was 3456 cubic yards.

Q. Yes, all right. I want to know what the estimated cost was going to be per yard?

(Testimony of Ralph Nelson.)

A. The estimated labor cost?

Q. Yes, the estimated labor cost that you have here as being the actual cost, what was the estimated labor cost for the 100-F area?

A. \$19.55 a cubic yard.

Q. Beg your pardon?

A. \$19.55 a cubic yard.

Q. \$19.55 a cubic yard? A. Yes. [1356]

Q. So the estimate on which this bid was made was about nine dollars short of the actual cost, was it not, on concrete poured to March 31?

A. Yes, that is right.

Q. In other words, nine dollars short?

A. Yes, sir.

Q. And that \$19.00, if I understand your formula correctly, also included direct cost, overhead plus ten per cent profit?

A. No, this \$19.55 only included our direct labor cost with payroll taxes and insurance figured in.

Q. And that \$19.00 does not include, then, an additional 25%? A. No, sir.

Q. If it did it would be approximately, as I see it, approximately a fourth more, and would be, if you included overhead and profit, would be \$25.00 rather than \$19.00? A. Yes, that sounds right.

Q. And that still would be \$3.41 under the actual cost of pouring, isn't that right?

A. Yes, that is right.

Q. That is right; in the 100-H area will you tell me what your estimated cost of material per cubic

(Testimony of Ralph Nelson.)

yard is indicated in the bid estimate as to yards in that area? [1357]

A. You mean, the labor costs again?

Q. Yes, the labor cost. A. \$21.19.

Q. \$21.19? So the cost as shown here, \$20.91, was less the actual cost up to March, wasn't it?

A. Yes.

Q. All right. Now, going back again to the 100-F area, although the cost of the cubic yards poured was about eight dollars in excess of the yards poured, eight dollars per yard in excess labor cost than that in the 100-H area up to March 31, you see that, do you not? A. Yes.

Q. The ultimate cost or, rather, the cost in the 100-F area from 6/6/56 to 9/30/56 was \$39.71 per cubic yard, was it not? A. Yes, sir.

Q. While the cost in the H area, the 100-H area, from 6/6/56 to 9/30/56 was \$42.92 per cubic yard labor cost? A. Yes, sir.

Q. So, where the original labor cost per cubic yard in the 100-F area was some eight dollars in excess of the original cost per cubic yard of the concrete pour in the 100-H area prior to March 31, the excess in the 100-F area occasioned by the labor cost from 6/6/56 to 9/30/56 was considerably less than the excess cost for the same [1358] period in the 100-H area? A. Yes, that is right.

Q. So, where the cost was low in the 100-H area, it more than doubled, did it not?

A. Yes, that is right.

Q. In other words, where what apparently was

(Testimony of Ralph Nelson.)

the most efficient pour up to March 31 became the less efficient? A. That is right.

Q. Isn't that right? A. Yes, sir.

Q. Can you explain that to me?

A. I can give an explanation but, I mean, it is not ordinarily my job, this is the way it turned out.

Q. That is the way it turned out? A. Yes.

Q. I see. Now, 21 and 22 are those exhibits, do you have those?

The Clerk: He does.

Q. (By Mr. Etter): Oh, yes, here we are. Now, calling your attention to 21, this is a projection chart, is it not?

A. Yes, it's a construction status chart.

Q. A construction status chart? Now, looking at the third item which appears to the left under the designation of "component" do you see that "concrete"? A. Yes. [1359]

Q. "Estimated Cost, \$165,000," do you follow me out here? A. Yes.

Q. All right. Now, carrying that over to the end of March am I correct in assuming that the projection contemplated 80% completion of the concrete pour at the end of March?

A. Yes, I believe that is what it is.

Q. Isn't that right? A. Yes.

Q. And that is what the engineer estimated that there would be, 80% of that concrete in F area poured by the end of March, correct? A. Yes.

(Testimony of Ralph Nelson.)

Q. As a matter of fact, what percentage was poured by the end of March?

A. I don't have that information.

Q. Well, it wasn't anywhere near 80%, was it?

A. No, it wasn't that high.

Q. Beg your pardon?

A. It wasn't that high.

Q. What was it, about a third, if you can tell me?

A. (Witness refers to file): I can't give you that information. It would take some figuring. In other words, anything I have here is not figured in that manner.

Q. I see. So you couldn't tell me how close they were to this projection? You do know definitely it wasn't any [1360] 80%, isn't that right?

A. Yes, it wasn't 80%.

Q. Now, taking the other one, the 100-H area, and looking at the third item down, which is, "Concrete," do you notice that?

A. Yes.

Q. And extending it out \$164,000, now, if I am correct the projection there indicates that at the end of March 50% of that concrete should have been poured?

A. That is what the chart says.

Q. That is right. As a matter of fact, 50% of it was not poured at the end of March, was it?

A. I don't believe it was.

Q. I beg your pardon?

A. I don't believe it was 50%, no.

Q. I see. So that, actually, Morrison-Knudsen through no act of these defendants, missed completely the projection chart which appears as to the

(Testimony of Ralph Nelson.)

completion of concrete pouring in both of these areas, isn't that correct?

Mr. DeGarmo: I will submit the witness is not the one to answer that question. He is a bookkeeper and if he can answer that he is better than a bookkeeper.

Mr. Etter: I thought he was doing some accounting.

Mr. DeGarmo: Well, you asked him a question that I don't think he is competent to answer. If you will read the [1361] question, I think it's obvious.

Mr. Etter: Well, let's rephrase it a minute.

The Court: Well, all right. I think what you asked appears in the chart here. What the explanation may be is a different matter, but it appears on here to me, at any rate.

Q. (By Mr. Etter): Yes; is there any way that here, possibly by tomorrow, so that we can move along, that you can determine what the percentage of pour was as to each of the projects at the end of March? A. I would imagine so.

Q. I beg your pardon? Would you try and figure that out for me; you know what I want, don't you?

A. I believe so, yes.

Q. In other words, to explain it, 21 and 22 indicate first as to the one area, that 80%, this projection contemplated that 80% of the concrete provided there would be completed by the end of March and the other that 50% in the H area, and I should like to know of the total amount of pour, that is, of the bid amount upon which these were based, of

(Testimony of Ralph Nelson.)

the bid amount, how much actually of the entire bid amount was poured?

A. I don't quite understand what you mean by "bid amount"? There was no bid amount, this was a lump sum.

Q. Well, yes, but didn't the cost estimate indicate a [1362] prospective number of yards that would have to be poured?

A. I would assume that somebody had done some figuring.

Q. Well, have you that available or can you make it available?

A. Well, I gave you a figure but I don't know whether that was the actual figure.

Q. I see, could you find out, do you think? Is it possible that somebody has that information, counsel?

Mr. DeGarmo: Well, I am sure we have it. Do you want him to figure it or do you want me to furnish it?

Mr. Etter: No; I was inquiring whether they had and he indicated he might not be able to, and I was just inquiring whether you had that information.

Mr. DeGarmo: I think, and I say "I think" that we can tell you what percentage of the originally estimated concrete was poured as of March 30, '56. If we can do so, we will, although I think it's entirely immaterial, but we will accommodate you in every way we can.

(Testimony of Ralph Nelson.)

The Court: Will you have that in the morning, then?

Mr. DeGarmo: We will do our best.

Q. (By Mr. Etter): Fine. Now, turning over to the second page of this Exhibit 33, as to the 100-F area you have an estimated cost per cubic yard of \$6.10 material cost? [1363]

A. "Supply cost" is the word used.

Q. Supply cost? That supply cost, does that include the items listed in the 100-F area, that is, rental, supplies, prefabrications, scaffolding, and all that sort of thing? A. Yes.

Q. And includes, also, does it, the cost of the concrete?

A. No; it does not include the cost of the concrete.

Q. In other words, the estimated cost per cubic yard is \$6.10, which is derived from the items which I have read to you, uniform rentals, supplies, lumber, scaffolding, miscellaneous small tools, and so on?

A. \$6.10 was the estimated cost of those items.

Q. \$6.10 per cubic yard was the estimated cost of those items, is that right? A. Yes, sir.

Q. Now, can you tell me what the actual cost per cubic yard of those items was as to concrete poured up until March 31?

A. I could by doing a little mathematical computation.

Q. All right, will you try and do that by tomorrow? A. Yes.

(Testimony of Ralph Nelson.)

Q. All right, and looking again at the 100-H area, you have a total estimated cost per yard which, I assume, is derived from the same basis and formula as that in the [1364] 100-F area?

A. Yes.

Q. Of \$6.49? A. Yes.

Q. Would you determine for me, if you can, before tomorrow, that is the estimated cost, would you determine if you could, the actual cost of the item of concrete poured, that is until March 31?

A. I can give you a figure of what was on the books, what we had paid for that material. It wouldn't be an accurate cost per cubic yard, there is so much of this material that has a number of reuses.

Q. Yes.

A. So that actually that figure would not be accurate.

Q. Well, then, of course, this estimate is important to us, as you can understand, because it is the difference of several thousand dollars. Are you saying now that your estimate is just an estimate and really has no basic justification?

A. No; I am saying that as far as at the period March 31 we would have a number of items, for instance, lumber——

Q. Yes.

A. (Continuing): ——that we had paid for and that were in our job cost, but we used that same lumber later on.

Q. At less cost? [1365]

A. It would have the effect, yes, of reducing the

(Testimony of Ralph Nelson.)

cost per yard at that time. It would show a fairly high figure.

Q. Is this estimated cost per cubic yard \$6.10 and \$6.49, were those estimated bid figures along with the other estimated bid figures that made up this contract? A. Yes.

Q. They were? A. Yes, sir.

Q. And were they as close to being accurate as some of them have proved to be here?

Mr. DeGarmo: Well, now, I object to that question on the ground it's argument.

The Court: Yes; I will sustain the objection.

Q. (By Mr. Etter): Well, it is, as you say, however, just an estimate. Now, you are telling me you can't actually break down and tell me what the cost of a cubic yard was up until March 31 before this strike?

A. No; I said that you can't make an accurate computation until you have used all of this material over and over again.

Q. Well, is there any way here that you can make an accurate computation of what the actual cost should have been, excluding strike costs?

A. I don't quite understand what you [1366] mean?

Q. Well, you have a total actual cost of \$38,557.01, isn't that right? A. That is right.

Q. And, as I understand, that includes items of cost which are chargeable or alleged to be chargeable to the strike of the Engineers and Teamsters?

A. Yes; that would be right.

(Testimony of Ralph Nelson.)

Q. Is that right? A. Yes.

Q. Well, can't you tell me what the actual cost of any of these items might have been for four months during your operation when there wasn't any strike?

A. I could give you a figure but we would have used a lot of this material later on.

Q. Well, then, how can you determine what cost is attributable or what loss is attributable to the Engineers and the Teamsters, and what may be merely depreciation or really a lack or a reduction in charge, let's put it that way, for these various items; how can you tell which is which?

Mr. DeGarmo: Well, now, if your Honor please, the witness has answered this question. I asked him specifically so as to cover this type of examination if it was possible to determine at a particular date what your average cost per yard was for materials, and he said "no." He has [1367] told counsel now at least three times, to my certain knowledge, that it is not, and he has said why, because some of this material is used over and over again and you can't tell until you get to the end of the job how many times you have used it, and, therefore, what your cost is, I submit that is material and the witness has made answers repeatedly.

Mr. Etter: Well, I may say here counsel here has a chart in which he says that the excess cost due to this strike is \$13,000 in one instance, and nearly \$9,000—in other words, he comes in and says that we omitted \$22,000 on this particular item,

(Testimony of Ralph Nelson.)

and he says the reason that we owe it to them is because they made an estimate of ten cents, \$6.10, and \$6.49, and we are bound in accepting their estimate; just to take all of these figures of cost, subtract their estimate with the estimate of cost and charge us with the excess, that is what he wants to do here.

Now, I certainly have a right to inquire whether his estimate of \$6.10 and \$6.49 is any better than some of the others.

Mr. DeGarmo: If that is what you want, I am in entire agreement with you. I do not claim that either you or the Court is bound by our estimate of cost. I will have figures on that.

Mr. Etter: Are you going to certify as to this estimate or are you going to leave this in your contract as to [1368] performance?

The Court: I haven't considered this is binding, it's for the Court to decide.

Mr. Etter: I have a right to inquire as to whether he can give me the actual cost of this item prior to the strike. For instance, say the actual cost of this item prior to the strike was eight or nine dollars per cubic yard and some three or four dollars more, the rest of it, it would make an awful difference what we were responsible for.

Mr. DeGarmo: The witness has stated once on direct examination, and he has stated three times on cross-examination that it is not practicable or possible to give you a cubic yard cost, he can give you the cost which is on the books to any date, and

(Testimony of Ralph Nelson.)

he will be glad to do that, but if you ask him to give you a cubic yard cost, he cannot because it isn't possible to do it.

The Court: Well, that is true, that is the answer, anyway.

Mr. Etter: Then what you are saying here is that, all you are doing here is making an estimate?

Mr. DeGarmo: No; I am not stating any such a thing nor has the witness. These records are comparable to the books of the company, you can verify them, I don't know whether you have verified them.

Mr. Etter: That is the estimated cost? [1369]

Mr. DeGarmo: That is the estimated cost, yes, and that is not what you are asking this witness about.

The Court: Let me ask you this, this Exhibit 33, I am not sure that I understand just the basis of this here.

Mr. Etter: For instance, your Honor, all I am trying to do, here are two exhibits, 21 and 22.

The Court: Pardon me, just a moment.

Mr. Etter: Yes.

The Court: Your total actual cost here is over the whole life of the job, isn't it?

Mr. DeGarmo: That is correct.

The Court: For instance, you say that the scaffolding, materials, and so forth, amounted to twenty-four forty-four fifty-three, that and your small tools, and so forth, that was over the whole life of the job?

Mr. DeGarmo: That is correct.

(Testimony of Ralph Nelson.)

The Court: And then you prorate it here as you have done in this, and the witness says that he can't do that for a particular piece because he doesn't know how much material was used over again or to what extent?

A. Yes.

The Court: All right, go ahead. I think I can understand that. The Court will pay very close attention to your arguments, both sides, at the end of the evidence without previewing them on the witnesses, if I may put it [1370] that way.

Mr. Etter: Well, as long as the witness' answer is that he doesn't know and he can't tell, I won't examine further.

The Court: Well, that is what he said.

Mr. Etter: All right, you may inquire.

The Court: Mr. Carey? [1371]

Cross-Examination

By Mr. Carey:

* * *

Mr. Carey: I now ask to be marked for identification a photostatic copy of a letter on the letterhead of Allen, DeGarmo and Leedy, dated April 27, 1956, signed by [1373] Mr. DeGarmo and addressed to the International Union of Operating Engineers, Washington, D. C., or addressed to the Teamsters Local 839 and the Engineers Local 370, the defendants in this case, and with at the end a notation that copies had also been sent to the Union, the International Union of the Engineers and Joint

(Testimony of Ralph Nelson.)

Council of Teamsters in the Washington Conference. I would like to have you mark it for identification.

The Clerk: Marked Defendant Teamsters No. 50.

The Court: What was the number?

The Clerk: 5-0; fifty.

Mr. Carey: Fifty.

Q. I think you have already answered you were not at all familiar with that letter, or are you?

A. I may have seen a copy of this letter.

Q. Well, do you know whether you had or not?

Mr. DeGarmo: If you want to offer it, Mr. Carey, I have no objection. You don't need to identify it further, as far as I am concerned.

The Court: Do you wish to offer it?

Mr. Carey: Yes.

The Court: All right, it will be admitted.

(Whereupon, said document was admitted in evidence as Defendants' Exhibit No. 50.) [1374]

* * *

Q. You referred at the instance of Mr. DeGarmo to Exhibits 34 and 35, those being these two, what we might call rental schedules of the AGC and that other organization, do you remember that?

A. Yes, sir.

Q. Now, Morrison-Knudsen has its own rental schedule, hasn't it? A. Yes; they do.

Q. So long as you have been with Morrison-Knudsen in figuring up any of their jobs you have never, or you have always applied Morrison-Knud-

(Testimony of Ralph Nelson.)

sen's own schedule and have never applied either of these other two to actual accounting on the job, have you?

A. Yes; I have. I have billed other firms at these rates.

Q. No; I am not asking that; that isn't the question. I am not asking about Morrison-Knudsen's job; Morrison-Knudsen apply uniformly their own rental schedule, [1377] don't they?

A. To their own equipment, yes.

Q. Yes, and that is what you did on this job?

A. Yes.

Q. Now, if in this instance you would apply the Morrison-Knudsen rental rates rather than the AGC and this AED rates, the charge for rental equipment instead of being as you now claim about \$29,000, would be about \$9,100, wouldn't it?

A. I haven't done that.

Q. What?

A. I haven't done that in this Union.

Q. I know you haven't, but I say if you had done it, the actual amount that the Boise office charged to this job was not \$29,000, but about \$9,100, isn't that right?

A. Well, I am not sure of the \$9,100, I haven't verified that figure.

Q. Well, can you verify it by morning?

A. Yes, I could. [1378]

(Testimony of Ralph Nelson.)

Redirect Examination

By Mr. DeGarmo?

Q. Well, Mr. Nelson, will you refer to Plaintiff's Exhibit 29, do you have that in front of you?

A. What is the item number?

Q. Yes, you have it here. A. Oh, yes.

Q. I don't mean to contradict you, but maybe I know more about your records than you do. There is one item on here counsel asked you if there was any item on this exhibit in which you actually had paid the AED rental which is shown here.

The Court: You are referring to 29?

Mr. DeGarmo: 29.

The Court: Yes, all right.

Q. (By Mr. DeGarmo): I call your attention to an item listed here, well, it's about, well, it is just after [1380] the automotive equipment at the top of the page, "125 EFM Ingersoll-Rand Gyro Compressor," listed at \$198 a month. Now, can you check your records and tell the Court whether you actually rented that vehicle?

A. This specific one here was actually our own. Later on we rented two from Inter-Mountain Equipment Company at AED rentals, but this specific one here was ours.

Q. Did you rent an identical piece of equipment? A. Yes; 125 Ingersoll-Rand.

Q. And what did you pay for them?

A. AED rates.

(Testimony of Ralph Nelson.)

Q. Was that \$198 a month?

A. I believe that is the figure. I would have to accurately check the invoice.

Q. Now, while we are on this exhibit, Mr. Nelson, do you have a company manual there?

A. Yes.

Q. Will you take out of that the sheet which relates to this controversial company rental, the explanatory sheet that explains what you do and what you are charging and who you are charging and for what? What is this document that you are removing the sheets from, Mr. Nelson?

A. This is the equipment management procedure that is Morrison-Knudsen Company's administrative bulletin, point 151. [1381]

Q. You didn't listen to the question that I asked you. I asked you what was the document from which you are removing sheets?

A. Oh, that is our administrative bulletin.

Q. And what is that volume? What relationship does it have to accounting practices within the company?

A. This deals with the equipment procedures.

Q. Well, does the entire volume deal with equipment procedures or only the sheets that you hold in your hand?

A. The two sheets that I hold in my hand.

Q. And the question that I asked you was, does the volume which you have in front of you, what does it deal in from an accounting standpoint?

A. All phases of company administration.

(Testimony of Ralph Nelson.)

Q. Is that the volume which determines the accounting procedures for the entire organization?

A. Yes; that plus, we have another accounting procedure with us.

Q. Now, you have withdrawn from this document three pages. Will you please mark these as an exhibit?

The Clerk: Plaintiff's 51.

(Whereupon, Plaintiff's Exhibit No. 51 was marked for identification.)

Q. (By Mr. DeGarmo): I am handing you now, Mr. Nelson, that which has been marked as Plaintiff's Exhibit 51 for [1382] identification, will you state now for the record what that exhibit for identification is?

A. Administrative Bulletin No. 5.1, "Equipment Management Procedure," and Administrative Bulletin No. 5.2, "Equipment Accounting."

Q. Will you state, Mr. Nelson, whether those are the administrative documents which determine the basis for rental charge of equipment and which did determine the basis for rental charge of equipment during the project at the Hanford Works?

A. Yes, sir.

Mr. DeGarmo: Counsel has not had an opportunity to examine this.

The Court: Show it to counsel.

(Document handed to counsel Etter.)

(Testimony of Ralph Nelson.)

The Court: Do you want to look at this, Mr. Carey?

Mr. Carey: No.

Mr. DeGarmo: I will endeavor if I may withdraw this this evening, to have photostatic copies of it made so that counsel and the Court may have it.

Mr. Carey: I don't care about the accounting charge of that, what I would like to know is the actual charge they made.

Mr. Etter: I think, as your Honor indicated, they ought to move along. I am not interested in this accounting [1383] procedure. I think that what we are interested in is what they have charged to this job.

Mr. DeGarmo: I am interested in the basis of the charge, too.

Mr. Etter: Well, we are prepared to admit a certain amount of what they charged and how they computed it. What difference to them does it make if we admit it?

Mr. DeGarmo: It makes a lot of difference, I think the Court will observe it as we go along here.

The Court: I think, as I understand it, they are going to bring in the actual figures. I will admit this as showing the basis for it. I assume that the witness will testify that the computation was actually made in accordance with the bulletin?

Mr. DeGarmo: Yes, and there will be further testimony.

(Testimony of Ralph Nelson.)

Mr. Etter: Well, if the amount is made in accord with those procedures, we will admit that that is how it is made and we won't need the further testimony.

Mr. DeGarmo: You may after you read this, Mr. Etter, and I think you will get a surprise.

Mr. Etter: I doubt that their accounting procedures can do any damage.

The Court: At any rate, let's see, it will be admitted as Exhibit 51. [1384]

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 51.)

Q. (By Mr. DeGarmo): In connection with the charge which appeared upon the project records for equipment on this job, will you state whether that charge was made pursuant to the directives as contained in the bulletin which you have in front of you as, I believe, Plaintiff's Exhibit 51?

Mr. Carey: Well, your Honor, if he doesn't know what the charge is, how can he know whether it is made in conformity with that formula or not?

The Court: He was the bookkeeper on this. Did you do the computing yourself?

A. Yes.

The Court: I think he can tell, and then bring in the figures later.

Q. (By Mr. DeGarmo): Do you understand the question?

A. Yes; it was in accordance with this.

Q. Now, while the figures will not be completely

(Testimony of Ralph Nelson.)

available now, can you tell us whether any charge was made to this project for any equipment during the strike period?

A. As far as our books are concerned, he made a charge for several pickups and the station wagon.

Q. Yes; is that all? A. Yes. [1385]

Q. I call your attention, Mr. Nelson, who determines whether a charge is made to the project or not? A. The district manager.

Q. That is not, then, determined by the Boise office or by your own job? A. No, sir.

Q. And in this case was there a charge made during the strike period for the equipment other than the equipment actually in use, the pickups?

A. No; there was none.

Q. So that all the strike period you had no charge, inter-company charge, for this equipment as listed on Plaintiff's Exhibit 29, other than the pickups? A. That is right.

Q. And I call your attention to this portion of the equipment procedure, "Items of minor equipment such as powered hand tools, minor construction equipment not included in the list of major equipment, office equipment and furniture, mess equipment, and so forth, are to be paid for by the job purchasing them and are to be charged into the job costs. No salvage will accrue to the job upon transfer of such items to another job or to a district warehouse except that all items' cost in excess of \$100 will arbitrarily carry a salvage value of \$10.00,

(Testimony of Ralph Nelson.)

except engineering equipment as [1386] covered in administrative bulletin No. 5.9."

Now, was that same procedure followed on this project? A. That is right, yes.

Q. Well, then, what would occur when you would get these items of minor equipment, what charge would appear on your records from the company charge?

A. If we got it from the company warehouse there may be some repair item that would be charged out, plus whatever salvage value it carried.

Q. And would that have any reference to its actual value? A. No; it would not.

Q. And it would not be a rental charge?

A. No, sir.

The Court: What amount would you charge if you got it from a company warehouse, did you say?

A. Well, it would depend on how it had been carried.

The Court: Supposing it was a hand power saw that cost \$150, that is, retail; what would you put down on your books?

A. Well, it would probably come in with a salvage value of \$10.00.

The Court: Yes, but what would you charge against the job?

A. If it is merely salvage I wouldn't charge anything against the job. [1387]

The Court: No; I am not talking about salvage. Suppose these hand tools had come in new to you,

(Testimony of Ralph Nelson.)

assigned to the job, small tools; what do you put down to charge against the project?

A. Your small tools, anything under, say, \$100, like I said there, would all be written off against the job.

The Court: Well, what would the "all" be in a particular instance in dollars and cents? I don't know, it's getting late in the afternoon, maybe I am getting fuzzy, but when you get a small tool in you charge the whole thing against the job, don't you?

A. That is right.

The Court: All right. Supposing you get a particular one in, what would you put down in dollars and cents as a charge against the project?

A. Whatever the invoice was.

The Court: What is the basis of the invoice?

A. Whatever the firm charges we are buying it from.

The Court: Oh, well, the retail cost of it, then? I thought you said something about getting it out of a company warehouse?

A. Yes.

The Court: You are talking now about something that has been used on another job?

A. Yes. [1388]

The Court: Yes, and you are talking now about the salvage value?

A. Unless there has been some repair.

Q. (By Mr. DeGarmo): If you got equipment

(Testimony of Ralph Nelson.)

from another job it would be on your books at \$10.00? A. Yes.

Q. Then if you had to spend money to make it usable, that would be a cost? A. Yes.

Q. It wouldn't appear on your books at more than \$10.00? A. Yes.

The Court: I understand it now.

Q. (By Mr. DeGarmo): Regardless of its value? A. Yes.

Q. Or how much use of it, and if you took it off the job at the end of the job, it would go off, too?

A. Yes.

Q. You would have a \$10.00 entry on and a \$10.00 entry off? A. Yes.

Q. That is all. Now these amounts which are shown as company rental amounts, for what use are those made, or what use is made of those amounts other than internal bookkeeping purposes (shows paper to witness)? A. No other use. [1389]

Q. Do you rent equipment to anybody else at those prices? A. No.

Q. Do you rent equipment from anybody at those prices? A. No.

The Court: Well, they are a part of your cost accounting on the job, aren't they?

A. Yes.

The Court: Do you use them for income tax purposes?

A. No; inter-company equipment rental; it's a charge to the job.

The Court: As to the particular job? You

(Testimony of Ralph Nelson.)

wouldn't take these into account, these rentals, as a part of the cost?

A. Yes; they are an expense to the job, but they are a credit to the equipment pool. One offsets the other.

The Court: Oh, I see. It is just an accounting entry, a bookkeeping entry?

A. Yes.

The Court: I think that Morrison-Knudsen, like everybody else, keeps books to see whether they are losing money or making money on a particular job?

A. Yes.

The Court: And you use this system to tell whether you are losing money on a particular job?

A. Yes.

The Court: And you have got to know what the [1390] equipment cost you?

A. I know what the job cost. What the actual cost to the company is, I don't know, I don't have access to the company books.

The Court: Do you have some other method if you want to determine now on the Hanford job, "What did we do here?" You tell me that, "We just lost so much money on this job." In computing that you must have some figure that you put in for the cost to you of the equipment that you used on that job, don't you?

A. Yes.

The Court: And do you have any other method besides this one of company cost accounting to determine that?

(Testimony of Ralph Nelson.)

A. No; that is what is used.

The Court: I see; all right.

Q. (By Mr. DeGarmo): But that cost which goes on the books is only such as is billed from the district office to that job for equipment?

A. Yes.

Q. Now, does the district office maintain an equipment pool that it accounts to for profit and loss on equipment?

A. Yes; they would.

Q. Now, you have available in your records the charge which appears during the strike period, that would be [1391] from March 22 to June 6 of 1956, do you not?

A. Yes, sir.

Q. And you are going to produce that charge and also what the charge was as of the end of March, 1956, I think that is what they asked for?

A. Yes.

Q. Mr. Nelson, you have testified in response to a question from Mr. Etter that the loss on this job was \$322,196 and some odd cents, I didn't take down the odd cents?

A. Yes, sir.

Q. Will you state if there is pending a claim on this job?

A. Yes; we have a claim into the Atomic Energy Commission.

Q. Well, now, when you stated in answer to counsel's question that the loss was that amount, did that take into account this claim?

A. No; I was merely making a mathematical computation.

Q. Well, when you closed out your books on this

(Testimony of Ralph Nelson.)

project as of December 31, 1956, is there a reference to a claim which is pending?

A. Yes; there is.

Q. What is the basis of that claim, Mr. Nelson, and what is the amount of it?

A. At the time this job was bid there was some confusion between our estimating department and one of the subcontractors. [1392] This subcontractor had submitted a price, a verbal quotation, to Morrison-Knudsen Company to do the mechanical work or referred to a certain division in the specifications covering installation of the pumping equipment. The estimating department assumed that inasmuch as he said he was going to do this work under this division, that it included all the cost, the cost of the millwrights, pipefitters, or whoever else it took to do that work. At the time the subcontracts were being written up and when this University Plumbing and Heating confirmed their quotation in writing, they denied that they had quoted for the millwrights' portion of the work.

Q. Well, I asked you the question, what is the amount of the claim and where is it pending?

A. It is \$120——

Q. If you have the amount of it, let's have it exact.

A. \$127,483.55.

Q. And is that a pending claim, and with whom?

A. With the Atomic Energy Commission.

Q. Has it been determined as yet?

A. No, sir; it has not.

(Testimony of Ralph Nelson.)

Q. I want to again, Mr. Nelson, come back to Plaintiff's Exhibit 29.

The Clerk: Here it is, sir. [1393]

Q. (By Mr. DeGarmo): And see if we can clarify one item here. By the way, Morrison-Knudsen Company is not just one project, is it, Mr. Nelson?

A. No, sir.

Q. And when you take money out of one project and put it in another, both entries affect Morrison-Knudsen Company, do they not, as an entity?

A. Yes, sir.

Q. Well, now, this particular piece of equipment that is referred to here as an MC-414 Lorrain motor crane, was it the same motor crane that was brought in and moved out that this move-in and move-out charge which has been discussed refers to?

A. Well, the motor crane that came in that was used after the strike was not this same crane.

Q. Well, you did have one come in during the strike, though?

A. One had come in at the beginning of the strike, this Lorrain, and then it had been moved out to Estacada.

Q. All right. And then did you bring another one in order to perform this work?

A. Yes; a Northwest motor crane was brought in from Klamath Falls, Oregon.

Q. And was there a move-in cost on that, too?

A. Yes, sir.

Q. When the motor crane went out to Estacada, the one that [1394] had been brought from Estacada

(Testimony of Ralph Nelson.)

and was sent back to Estacada, the move-out cost of that crane I think you have testified was charged to Estacada? A. Yes.

Q. Was that a Morrison-Knudsen project?

A. Yes; it was.

Q. So it increased the cost of that project by the amount of the move-out cost, did it not?

A. Yes; it would.

The Court: I must be confused here, I thought that this MC-414 Lorrain crane was charged, both the move-in and move-out cost, was charged to the job?

Mr. DeGarmo: Now, the testimony was that the move-in cost was charged as an item, but as a move-out charge it was charged to the Estacada project.

The Court: Oh, I see, on your internal book-keeping?

Mr. DeGarmo: We paid for both coming in and going out, it happened to be a different project that paid for it. It was paid for by Morrison-Knudsen Company; Morrison-Knudsen Company is not a project.

The Court: It's an institution, we hope.

Q. (By Mr. DeGarmo): Mr. Nelson, when the equipment is rented, do you pay rental only on the equipment while in use or do you pay rental from the time received or to the time delivered [1395] back? A. You are referring to?

Q. Equipment which is rented to an outsider.

A. An outsider, from the time it leaves their plant until it is returned.

(Testimony of Ralph Nelson.)

Q. And is that regardless of whether it is used during that interim period? A. Yes.

Mr. DeGarmo: I think those are the only questions that I have of this witness.

The Court: All right, Mr. Etter.

Recross-Examination

By Mr. Etter:

Q. One question: On this move-in and move-out of the Lorrain crane, you testified on my examination that the cost of the move-out was charged to the Estacada, what is that again?

A. It was charged to the contract at Estacada, Oregon.

Q. Estacada, Oregon? Now, apparently are you testifying, or is counsel telling us that they are charging it again back here to the Morrison-Knudsen job at Richland?

A. No; I didn't interpret his statement that way.

Q. Well, can you tell me whether they are charging it against Estacada, Oregon, and also charging it here in this lawsuit?

Mr. DeGarmo: The answer is "yes." [1396]

The Court: I think what they say now is as far as their internal bookkeeping is concerned, they charged it to the Estacada project, and also they are charging it in this lawsuit.

Mr. Etter: Counsel, in answer to my question, said they are charged to both of them.

The Court: I think we can start another witness. We will quit at 4:30.

Mr. DeGarmo: I think I can put on another witness.

(Witness excused.)

Mr. DeGarmo: Mr. Finlay, will you come forward and be sworn?

J. P. FINLAY

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you state your name, please?

A. J. P. Finlay.

Q. Where do you reside, Mr. Finlay?

A. In Spokane.

Q. And what is your business or occupation?

A. I am sales manager for the Inter-Mountain Equipment Company here in Spokane.

Q. Will you state what is the business of Inter-Mountain [1397] Equipment Company?

A. Well, we deal in construction, mining and logging equipment, selling new equipment and, in some cases, renting certain types of equipment.

Q. Will you tell us, Mr. Finlay, what is the area of operation of the Inter-Mountain Equipment Company?

A. Well, it's basically thirteen counties in Washington, the Panhandle of Idaho and two counties in Oregon, and there have been times where we go beyond those boundaries in certain instances, but

(Testimony of J. P. Finlay.)

our franchised area for the Spokane Branch are those just mentioned.

Q. Now, you have stated that you deal, among others, in construction equipment. Is that the type of equipment which is used by what we would term heavy construction contractors?

A. That is right.

Q. And as a part of your business do you rent heavy construction equipment?

A. Yes; I will have to break that down. There are certain kinds of equipment that we don't rent. To name one, a tractor, for instance; we don't rent a tractor primarily because it takes too much abuse and you never can get a value received for it; compressors, cranes, shovels, equipment of that type, we do rent.

Q. And when you rent equipment, Mr. Finlay, is there some [1398] standard guide in the construction industry and in the equipment rental industry for the determination of rental price?

A. Yes; we use what we term the Association of Equipment Distributors Guide. It's put out, oh, normally, every two years. Occasionally they slip another one in, but that is a guide and it is adhered to pretty closely.

Q. Is that what is normally referred to in the construction industry and in the equipment industry as AED rental?

A. That is right.

Q. Will you state, Mr. Finlay, to what degree that rental guide is used in the construction, the heavy construction rental business?

(Testimony of J. P. Finlay.)

A. Well, I think it's pretty much of a basis world-wide, not only in this country, but I have requests from overseas jobs referring to this AED as a guide, so you might say it's world-wide.

Q. Well, now, when you say it's used as a guide, does that mean that you do not use the precise dollar rental to the dollar and cents?

A. Not exactly; sometimes we do, sometimes we go maybe a dollar or ten dollars above; sometimes we may go a dollar or five dollars lower, but it is within a range of a very few per cent.

Q. Will you tell us, I want to bring out one thing, is there [1399] a relationship between Inter-Mountain Equipment Company and Morrison-Knudsen Company?

A. Yes, sir; there is.

Q. Will you tell us what the relationship is?

A. They own, Mr. and Mrs. Morrison, own the controlling interest of our firm.

Q. That is Mr. Harry Morrison?

A. Yes, and Mrs. Morrison.

Q. She is now deceased? A. Yes.

Q. His wife is now deceased?

A. Yes; the estate.

Q. So that it is, in effect, a related organization?

A. That is right.

Q. And who is the general manager for that company?

A. Our general manager is Mr. P. A. Dufford. He is our general manager and vice-president.

Q. How long, Mr. Finlay, have you been in the

(Testimony of J. P. Finlay.)

business of construction and mining and other types of heavy machinery?

A. Approximately 25 years.

Q. And how long have you been associated with the Inter-Mountain Equipment Company?

A. Since 1945, January 1st, 1945.

Q. What association did you have with the Inter-Mountain [1400] prior to that time?

A. Before being absorbed by Inter-Mountain, I was part of Howard Cooper, which is another distributing firm now mainly on the coast, but they sold their branch here to Inter-Mountain.

Mr. DeGarmo: You may cross-examine.

Mr. Etter: No questions.

Mr. Carey: I haven't any.

Mr. DeGarmo: That is all, Mr. Finlay.

The Court: The court will adjourn then until tomorrow morning at 10:00 o'clock.

(Whereupon, court was adjourned until 10:00 o'clock a.m., on February 26, 1958.) [1401]

Wednesday, February 26, 1958—10:00 o'Clock A.M.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit.)

Mr. DeGarmo: Mr. Reed, will you take the stand, please?

RAMON E. REED

recalled as a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

By Mr. DeGarmo:

Q. Yesterday, Mr. Reed, during the examination and cross-examination of Mr. Nelson, a request was made that we produce and testify as to the percentage of the estimated amount of concrete which had been poured as of March 31, 1956. Did you make a determination as to that fact last evening? A. Yes, sir.

Q. Will you state what that percentage was, first, as applies to the F area and referring to Plaintiff's Exhibit 21, I believe, if I can have 21 and 22?

The Court: March 31, 1956, it was? [1402]

Mr. DeGarmo: Yes; that is correct.

The Court: What is this area now you are giving?

A. The 100-F area.

The Court: All right.

A. 47%.

Q. (By Mr. DeGarmo): That is 47% of the estimated concrete item? A. Concrete item.

Q. And what was the percentage of the H area as of the same date? A. 41.1%.

Q. Now, Mr. Reed, in the question which was asked respecting this item, there were included ten days of the period of the strike, was there not?

A. Yes, sir.

(Testimony of Ramon E. Reed.)

Q. And if we take the ten days of the period of the strike off the computation and also take off the 18 days which the project was behind as of March 22, 1956, which was the date the strike commenced, what was your percentage of completion?

A. Scheduled completion?

Q. Yes. A. 53% was scheduled.

Q. And what was the actual?

A. 47%. [1403]

Q. That is in the F area?

A. In the F area.

Q. All right. Now, make the same computation in the H area. What was the schedule?

A. About 18% of the schedule.

Q. And what was the actual completion in the H area? A. 41.1%.

Q. As of March 22, 1956, Mr. Reed, what was the total percentage of actual completion as contrasted with the total scheduled completion on that date. I am referring now not to the concrete item but to all items of the contract as of that date?

A. In the F area on March 31 it was 25.2% scheduled or actually completed, and as scheduled was 27%.

Q. And as of the same date?

A. Wait, pardon me. I have the wrong one.

The Court: What is this percentage now?

Mr. DeGarmo: This is the percentage of the total contract, which included all items, including the concrete.

The Court: Yes; all right.

(Testimony of Ramon E. Reed.)

A. Pardon me. I was wrong in the F area. We had completed 25.2% total and scheduled as of March 31 was 43%.

Q. And in the H area what was there scheduled for all items; now, we are talking about all items and the actual completion. [1404]

A. 27% was scheduled; 19.5% completed; that is, on the 1st of April.

Q. As of the 1st of April? Now, as of the first date that you have a record after the completion of the strike which was, I think the testimony is the work was resumed on June 17, 1956; what was the over-all, and by "over-all," I mean all items of the work, percentage of completion, actual and the percentage scheduled? Give it to us by areas.

A. June 21 is the first one I have here.

Q. You are speaking as of June 21 now, 1956?

A. It was showing that there was 81% of the work scheduled in the F area and 32% actually estimated as complete.

Q. And in the H area what was the scheduled?

A. 62% scheduled and 22% estimated being complete.

Mr. DeGarmo: You may examine.

Mr. Etter: No questions.

Mr. DeGarmo: That is all, Mr. Reed.

(Witness excused.)

Mr. DeGarmo: I would like to call Mr. Nelson.

RALPH NELSON

recalled as a witness on behalf of the plaintiff, resumed the stand and testified further as [1405] follows:

Direct Examination

By Mr. DeGarmo:

Q. Mr. Nelson, from your cross-examination yesterday the request was made that you compute and produce this morning the cost of forming and framing materials and supplies as of March 31, 1956. Have you made that computation from your records? A. Yes, sir; I have.

Q. Will you state what those costs were and separate them as to areas F and H, if you will?

A. In the 100-F area, March 31, the cost as per the job books was \$18,301.80. For the 100-H area, \$11,440.44.

The Court: I didn't get you, first, on the F area?

A. \$18,301.80.

The Court: All right.

Q. (By Mr. DeGarmo): You were also requested, Mr. Nelson, during the course of your cross-examination, to compute and be prepared to testify this morning as to the actual charges as reflected by the books of account of the Hanford project for company equipment or for the equipment on the project during the strike period; have you made that computation? A. Yes, sir; I have.

Q. Will you state what was the charge which

(Testimony of Ralph Nelson.)

appears upon the books and records of the corporation of this particular project?

A. \$689.35. [1406]

The Court: \$689?

A. Thirty-five.

The Court: Thirty-five?

Q. (By Mr. DeGarmo): Now, I think you testified yesterday, did you not, Mr. Nelson, that during the period of the strike there was no charge by the district office for any of the equipment except certain of the pickups and that type of equipment?

A. Yes, sir.

Q. That is, after the end of March, 1956?

A. After the end of March.

Mr. DeGarmo: You may examine.

Mr. Etter: No questions.

Mr. DeGarmo: That is all, Mr. Nelson.

(Witness excused.) [1407]

Mr. DeGarmo: I will call Mr. Alfred J. Goade.

ALFRED J. GOADE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Mr. Goade, where do you reside?

A. Boise, Idaho.

Q. And did you come here last night for the purpose of testifying at this trial?

(Testimony of Alfred J. Goade.)

A. Yes, sir.

Q. Will you state what your position with Morrison-Knudsen Company is?

A. I am assistant comptroller in charge of accounting administration.

Q. Will you tell us, Mr. Goade, first, what educational background or experience you have for your position as assistant comptroller?

A. I have a bachelor of science degree in business administration from the University of Idaho, and I have almost 18 years' experience with Morrison-Knudsen Company.

Q. And have you worked for any other organization than Morrison-Knudsen Company in the accounting field?

A. No, sir. [1408]

Q. You have been in the accounting end of the corporation for 18 years, you say?

A. Yes, sir.

Q. As assistant comptroller, Mr. Goade, will you state generally the scope of your duties?

A. I have charge of the home office accounting, the branch office, and the field accounting in an administrative capacity, and I do some work with personnel, and that is about it.

Q. Are there other assistant comptrollers than yourself?

A. Yes, sir; there are two others.

Q. And in what field do they have particular jurisdiction?

A. One is in charge of company procedures, and the other is in charge of taxation.

Q. Mr. Goade, will you state the scope of the operation of Morrison-Knudsen Company?

(Testimony of Alfred J. Goade.)

A. The company is world-wide in scope. Last year we had approximately \$400,000,000 in uncompleted volume on a world-wide basis, and I think at the present time we have around 75 straight company operations and possibly 60 joint venture operations, and some 25 or 30 subsidiary companies that operate in this country and overseas.

Q. And are those world-wide activities as far as accounting procedure, centered in the Boise [1409] office? A. Yes; they are.

Q. Now, will you tell us, Mr. Goade, whether the company, for operational purposes, is divided into any divisions for operating purposes?

A. Yes, sir; we have seven operating districts.

Q. And is there one with headquarters in Seattle? A. Yes, sir.

Q. Where are the other headquarters of the various districts?

A. We have one in Los Angeles; Anchorage, Alaska; we have what we call the Boise district; we have an eastern district; and New York; that is, we have seven.

Q. You have an international district, also, in New York? A. Yes, sir.

Q. And an international district out of San Francisco? A. Yes, sir.

Q. State what bookkeeping or account procedures are handled in the district offices themselves?

A. The district offices do not maintain a separate set of records. For accounting purposes they are actually just a part of the home office accounting.

(Testimony of Alfred J. Goade.)

Q. They are not regarded, then, as branch offices?

A. No, sir.

Q. In connection with your duties as an assistant comptroller, Mr. Goade, do you have opportunity to be familiar [1410] with what is known as the equipment pool of Morrison-Knudsen Company?

A. Yes, sir.

Q. Will you tell the Court and counsel how this equipment pool operates and how it is handled from an administrative standpoint of the company?

A. The equipment is distributed, actually, by the operating districts, that is, it is assigned to the operating districts. The operating districts, in turn, rent that equipment to the projects.

Q. Now, when you say, "it's assigned to the district," is it charged by the Boise office to the district?

A. No, sir, the value of the equipment is maintained at all times on the books of the home office only.

Q. And are depreciation schedules maintained in the home office only, too?

A. Yes, sir.

The Court: Am I correct in assuming that, at least, except for minor items that the equipment is purchased by the Boise office?

A. Yes, sir.

The Court: It does all the purchasing of the major equipment and then assigns it out to the district office and then the district office makes the rental arrangement with the jobs, the project?

A. That is correct.

Mr. DeGarmo: May I have 51, I think it is?

(Testimony of Alfred J. Goade.)

Q. Are you familiar, Mr. Goade, with the document which I am handing you as Plaintiff's Exhibit 51 (hands paper to witness)? A. Yes, sir.

Q. And does that document, in general, outline the handling, the method of handling of company-owned equipment? A. Yes, it does.

Q. Now, in the establishment of rental rates for inter-company accounting purposes, what is the base used?

A. Actually, it is a base that is determined to try and recover certain costs.

Q. And what are those costs which you are attempting to recover in this case?

A. Those costs are depreciation, taxes and insurance, some transportation.

Q. And what is the formula which is used for the purpose of determining a dollar amount of rental for a particular piece of equipment?

A. Our formula is 60% of the AGC rate for the first twelve months, that is, on a new piece of equipment. After twelve months the rate is reduced to 65% of that rate.

Q. Now, does that 65% of the base rate continue thereafter, [1412] regardless of whether the piece has been depreciated entirely on the books and records of the company, the Boise office, or not?

A. Yes, it does.

The Court: I am afraid I didn't understand that answer, he said 60% of the AGC rate for the first twelve months?

Mr. DeGarmo: And 65% of that amount.

(Testimony of Alfred J. Goade.)

The Court: Oh, I see. Then, 65% of the 60%?

Mr. DeGarmo: I say, thereafter, continuing.

The Court: All right, I understand now.

Q. (By Mr. DeGarmo): Mr. Goade, after this equipment is assigned out to the districts and they make a charge to the various projects, what happens to that charge?

A. That charge is entered in our records, it's credited to the district.

Q. Well, how did you get in the Boise office the basis for charging the project and crediting the district?

A. The project sends in what we call a monthly equipment rental report which lists the equipment and the use on that project.

Q. Now, is that uniform throughout the company operation?

A. Yes, sir.

Q. And then when you get this report then do you charge back to the project the amount of the rental, and credit [1413] the district office with the same amount?

A. That is correct.

Q. All right, when you get to the end of the year, Mr. Goade, what do you then do with these charges or with these credits which have been credited to the district office and charged to the project from an accounting standpoint?

A. Actually, they become a part of what we call our equipment pool operation.

Q. And as a part of the equipment pool operation, Mr. Goade, are there any other credits to this account than the direct rental to the projects, the

(Testimony of Alfred J. Goade.)

company projects? A. Yes, sir.

Q. And what are those credits?

A. Those credits are from rental of outside, or equipment rented to outsiders.

Q. Now, included in outsiders are your own joint venture projects? A. Yes, sir.

Q. And is that true whether it is a joint venture sponsored project by Morrison-Knudsen Company, their project, or whether it is just a joint venture of which it is one of the joint venturers?

A. Yes, that is true.

Q. What is the distinction between a joint venture sponsored [1414] project and one in which Morrison-Knudsen Company is merely a venturer?

A. On the sponsored projects Morrison-Knudsen has charge of the operations and also the job records.

Q. All right. Now, when equipment of Morrison-Knudsen Company which is held in this equipment pool is rented to a joint venturer, a sponsored joint venture, that is one in which Morrison-Knudsen Company is the sponsoring contractor, is that equipment leased to the joint venturer at the company rate or at some other rate?

A. At some other rate.

Q. And state whether that rate is a greater or a lesser rate than the company rate.

A. It is a greater rate.

Q. And in the event the equipment is leased to a joint venture project of which Morrison-Knudsen Company is not the sponsoring contractor, is it

(Testimony of Alfred J. Goade.)

leased at the company rate? A. No, sir.

Q. At what rate is it leased?

A. At a greater rate.

Q. Does the company have occasion from time to time to lease equipment to others than any of its joint venturer projects? A. Yes, sir. [1415]

Q. And in the the event it is leased to anyone on the outside, is it leased at company rate or another rate? A. At another rate.

Q. And is that rate greater or lesser than the company rate?

A. It is greater than the company rate.

Q. Then, in the equipment pool as maintained by the Boise office, is there consolidated all of the revenue from this equipment, whether it is project revenue or joint venturer revenue or complete outside revenue?

A. That is correct, it is consolidated.

Q. Do you have with you, Mr. Goade, a balance sheet or a profit and loss statement, rather, for the corporation? A. Yes, sir.

Q. Will you produce it, please?

A. (Witness produces paper.)

The Court: Are your equipment vehicles insured?

A. Yes, sir.

The Court: And with what office or how is the insurance carried?

A. It's carried by the Boise office, we have fleet policies.

The Court: How about taxes and licensing?

(Testimony of Alfred J. Goade.)

A. Some licensing is carried on by the job where it is a local thing, and most taxes, however, are paid.

The Court: Paid by the Boise office? I see. [1416]
Licensing would depend on the laws of the State where the vehicles are operated, I suppose.

The Clerk: Marking Plaintiff's 52, your Honor.

The Court: What is that?

The Clerk: 52.

(Whereupon, Plaintiff's Exhibit No. 52 was marked for identification.)

Mr. Etter: We accept that.

Mr. DeGarmo: It is used largely for illustrative purposes, I am not intending to, although it is the statement.

Q. Mr. Goade, I am handing you that which has been marked as Plaintiff's Exhibit 52 for identification. Will you state what it is (handing paper to witness)?

A. This is a pre-audit profit and loss statement of Morrison-Knudsen, Inc., for the year ending December 31, 1957.

Q. When you say a "Pre-audit Statement," what do you mean, Mr. Goade?

A. We are in the process now of having our books audited. There will be some adjustments from this statement; however, we think they will be slight.

Q. Does there appear upon this statement an item which refers to this motor pool that you have been testifying [1417] concerning?

(Testimony of Alfred J. Goade.)

A. Yes, sir.

Q. Will you refer to that item and tell us which one it is, how it is headed?

A. It's under the general classification of "Miscellaneous Operations," and the title of the account is "Equipment Pool."

Q. Now, in this particular year of 1957 does the statement which you have in front of you reflect whether there was a profit or loss upon the equipment pool itself?

A. Yes, sir.

Q. And what is the figure that is shown there as to whether it is a profit or loss?

A. It is a profit.

Q. And in what amount?

A. \$1,370,332.11.

Q. Now, Mr. Goade, from your knowledge of the way in which this motor pool is operated, can you determine from that figure, first, as to whether there was a profit made on outside business?

A. No, sir.

Q. You can't determine that?

A. No, sir.

Q. Can you determine from that figure whether the equipment was actually leased to the company operations at cost or [1418] at any figure above or below cost?

A. No, sir.

Q. You cannot tell either?

A. No, sir.

Q. Why can you not tell?

A. Because in this account we are mingling items, we are bringing in revenue from rental, from straight M-K operations, and also rentals from outside sources.

Q. Well, then, is it true from the accounting end

(Testimony of Alfred J. Goade.)

of the company that you are not able to determine in any year whether this rental rate that is established for company owned equipment to company owned projects returns actually your cost or not?

A. No, sir.

Q. And there are no records which enable you to determine that, is that correct?

A. That is correct.

Q. In this particular balance sheet or profit and loss statement which you have in front of you, does it show the result of the various districts' operations of the motor pool? A. Yes, sir.

Q. What does it reflect in 1957 with respect to Seattle district?

A. Seattle district shows a loss. [1419]

Q. Now, when a district shows a loss, what happens?

A. Well, actually, they haven't recovered their cost or they haven't rented enough equipment outside to make up the difference.

Q. Well, from a company standpoint what happens with that loss in a particular district?

A. That is just included on the home office books as the profit or loss from the operation of the entire equipment pool.

Q. If you will go across this statement, Exhibit 52 for identification, this lists, does it not, each district by numbers and states whether it operated its equipment pool at a profit or a loss during the year?

A. Yes, sir.

Q. And it is the consolidation of all of the seven

(Testimony of Alfred J. Goade.)

districts which produces a figure of a million some dollars' profit on the pool for a year, is that correct?

A. Yes, sir.

Mr. DeGarmo: I think you may examine.

Cross-Examination

By Mr. Etter:

Q. Just one or two questions, Mr. Goade.

A. Yes.

Q. If I understand you correctly, when you get right down [1420] to it you said that the value of the equipment was maintained in the home office and the depreciation was maintained in the home office?

A. Yes, sir.

Q. And the receipts from any type of rental, whether it is joint venture or foreign or otherwise, are all deposited or received into a separate account known as the equipment pool account, I suppose, something of that nature?

A. That is correct.

Q. And that it is determined, then, on the basis of the rental values from all of these different projects that whether or not during the year there is a loss or a profit arising from the operation of the equipment pool?

A. Yes, sir.

Q. Can I assume it to be reasonably correct in the years that you have been working for Morrison-Knudsen the company, at least within the equipment pool, has developed sort of an actuarial basis to rentals that are charged to local contractors, districts, and other contractors?

(Testimony of Alfred J. Goade.)

A. You mean the straight M-K contracts is the basis for the percentage we use? Yes, sir.

Q. And can I also assume if there were constant losses in [1421] the equipment pool, there might have been revision through the whole rental system if it became necessary to so do?

A. If there was a loss in the operation of the entire equipment pool which would reflect, also, the profit from outside rentals, yes, sir.

Q. You would do that? A. Yes.

Mr. Etter: That is all.

The Court: I assume, Mr. Goade, it's your policy to make rental pool operations self-supporting, so to speak?

A. That is correct.

The Court: In other words, you, in some manner or other, take care of depreciation and wear-out, so that you are able from the fund to purchase new equipment?

A. Yes, sir.

The Court: I see. All right, I have no other questions.

Redirect Examination

By Mr. DeGarmo:

Q. Those rates are influenced by the amount of equipment that you are able to rent on the outside?

A. That is correct. The basis is not changed. Of course, if there is enough profit from outside rentals, that is, it's looked at from that picture only. [1422]

Q. There is one further question, perhaps, that

(Testimony of Alfred J. Goade.)

was raised by the Court yesterday that perhaps I should inquire of Mr. Goade concerning: If a particular project has a loss, what occurs with that, from an accounting standpoint, as far as the company operation is concerned?

A. That is consolidated with the home office records and becomes a part of the profit or loss from the entire company operations.

Q. Well, in this case of this particular project at Hanford, assuming that the books when closed out for that project would show a loss of, say, three hundred and some thousand dollars, and that thereafter there should be a recovery, what happens with a claim against the Atomic Energy Commission or by reason of this litigation, what happens with that fund?

A. If the contract records have not been closed, that would become a part of the revenue on the contract. If the contract records have been closed, it would be taken into the home office books as income from completed contracts.

Q. Then, is it true, Mr. Goade, that insofar as Morrison-Knudsen Company is concerned, all of the profits and losses in operations from all sources in all districts are handled in the Boise office and not in the districts themselves? [1423]

A. That is correct.

Mr. DeGarmo: I think that covers it.

(Testimony of Alfred J. Goade.)

Cross-Examination

By Mr. Carey:

Q. Mr. Goade, does this Exhibit 52 of yours cover the year 1957 or '56, the year in which the strike occurred? A. 1957.

Mr. Etter: It is just illustrative.

Mr. DeGarmo: It's only illustrative in order to show the manner of operation of this pool and I at this time wish to offer the exhibit.

Mr. Etter: No objection.

The Court: Admitted.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 52.)

Recross-Examination

By Mr. Etter:

Q. One question, Mr. Goade: Can you tell me whether this particular contract has been closed, or are the books still open?

A. I believe the books are still open on this particular contract.

Mr. Etter: That is all.

Mr. DeGarmo: That is all, Mr. Goade.

(Witness excused.) [1424]

Mr. DeGarmo: Call Mr. Madsen.

R. H. MADSEN

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Your name is R. H. Madsen?

A. Yes, sir.

Q. Where do you reside, Mr. Madsen?

A. In Bellevue, Washington.

Q. And what is your occupation or profession?

A. I am a civil engineer and I am presently serving as assistant district manager for the Seattle district, Morrison-Knudsen Company.

Q. Where did you receive or obtain your education as an engineer, Mr. Madsen?

A. I graduated from the University of Utah with a B.S. degree in civil engineering in 1937.

Q. Subsequent to your graduation will you state what experience you have had in the construction field?

A. Yes, sir. About five years after getting out of school I was employed as an engineer for the Bureau of Reclamation and I went to work for the joint venture consisting of Utah Construction, Morrison-Knudsen Company and Pomeroy, on the construction of the Geneva [1425] steel plant at Provo, Utah; and I was transferred from there to the Anderson Ranch dam on the joint venture of Morrison, Shea, Twaits and Winston Company. I was thereabout two and a half years.

(Testimony of R. H. Madsen.)

Q. What position did you occupy with that joint venture?

A. I was the project engineer at the Anderson Ranch dam, and from there I was transferred to the Cascade dam, built by Morrison-Knudsen Company north of Boise, Idaho, as assistant project manager. I was on that job about two and a half years; and from there I was transferred to the Grand Coulee dam as assistant project manager on the Morrison-Knudsen-Peter Kewitt Company contract for the construction of the pumping plant, the switchyard and canals, and so on. I finished, or I was project manager there until the end of the job six or eight months; and from there I was transferred to the Morrison-Knudsen Company job in Canada, on construction of the power plant and transmission line, tunnels, and so on, at the Kittimat project for the Aluminum Company of Canada. And from there I was transferred to the Seattle district in September of '54, as assistant district manager.

Q. Were you the assistant district manager, then, of the Seattle district during the period of construction of the Hanford Works project? [1426]

A. Yes, sir.

Q. Mr. Madsen, will you tell us the jurisdictional district of the Seattle office, how wide the scope is of your operation?

A. Our office covers the states of Oregon, Washington, northern Idaho, Montana, north and south side, with some special arrangements when the com-

(Testimony of R. H. Madsen.)

pany branches out; we handled one job on the St. Lawrence Seaway; that is the general area, though, that we cover.

Q. What personnel are maintained in the district office, Mr. Madsen?

A. We have our regional manager, Mr. Griffin, located in our office, who covers the Northwest district and the Canadian district. We have our district manager, our district office manager, district engineer, purchasing office, accounting set up, and our estimating department, our engineering and estimating department.

Q. What office of the company does the estimating for bidding jobs within a district? Does the district office do the estimating or does each project estimate its own project?

A. The district office does the estimating for the work in the district.

Q. Does it also do the bidding of those jobs?

A. Yes, sir. [1427]

Q. Did you have some part, Mr. Madsen, in the preparation of the bid estimate for the Hanford Works project?

A. Yes, sir.

Q. You are familiar with it? A. Yes, sir.

Q. Will you tell the Court and counsel, Mr. Madsen, the process that is gone through in making an estimate for a bid?

A. Well, we get the plans and specifications, usually, about a month ahead of time and according to the terms of the contract you are required to make an inspection of the job. On our Hanford job

(Testimony of R. H. Madsen.)

the first inspection was made by our district engineer and by a project manager that had done work in the Hanford area in the earlier construction phases, and by one of our engineers. They spent, I think, as I recall, took a couple of days to do that, made a careful examination of the area to see what the nature of the work was physically tied to, what the roads and the power facilities, water access, and so on, was going to run into.

And then we go back to the office, and in the office we have several estimators who, when the plans come in, they take the plans and go through a detailed study of it, go through with a complete take-off of the amount of excavation, the amount of concrete, the [1428] amount of form areas that are required to form the job and the other detail items broken down as to classifications that can be priced out comparable to work that has been done in the past that we have records on available in our office. When we get the breakdown and the detailed calculations made, why, we proceed with the pricing out of the items and we have when we do the pricing and the take-off in this case, we had the superintendent who has been working on similar work, concrete work, using these uniform concrete forms and he has been with the company for a number of years, been at Grand Coulee and up on the Canadian job and working in the area around Seattle. He sat in on preparing the estimate.

The estimator has access to any record we have and access to any experienced people in our com-

(Testimony of R. H. Madsen.)

pany that have information on how the pricing should be done. Well, this estimate is worked up then on the detailed costs of the labor for each item, and cost of materials, and the cost of the permanent materials, the cost of the equipment. And when this is finally put together it takes somewhere around two weeks or so to get that amount of detail done, and when it is ready for review, why, we have a meeting in the district manager's presence so that he can review the bid [1429] documents and have the engineers and I sign on the final pricing of this job.

Q. Well, then, is that the process by which you eventually arrive at a bid price? A. Yes, sir.

Q. Now, it has been suggested that this bidding and construction progress schedules are based upon guesswork, is that true?

A. No, sir, that is not true.

The Court: I don't think anybody says they are guesswork, and also nobody says that they are infallible, the proof of the pudding is in the eating?

Mr. DeGarmo: That is correct.

The Court: I think you can demonstrate, as Bobby Burns said, "The best laid schemes o' mice and men gang aft a-gley." As a matter of fact, this resulted in a loss without strike benefits?

A. We don't know for sure.

The Court: Well, even if you collect from AEC the full amount of your claim and even the full amount of your claim here, you would still be behind on the job?

(Testimony of R. H. Madsen.)

A. Very little.

The Court: Well, Morrison-Knudsen's "little" probably wouldn't be my "little," but big to me. If I got these figures correctly, it seems to me that it was over a [1430] million dollar loss here, wasn't it?

A. Oh, no, sir, that is misleading.

The Court: No, that is not right.

Mr. Carey: \$322,000.

A. The books, the way they stand, show about \$330,000, and we have this present claim that runs around \$30,000 or \$35,000 that is in the record, plus a fair settlement on this, it would be questionable whether we would be in the black or in the red.

Q. (By Mr. DeGarmo): Mr. Madsen, in your years of experience with Morrison-Knudsen Company, what has been the experience that you have noted as to the ability of the company to meet progress schedules?

A. Well, we meet the schedules, that is what we end up doing, and we definitely meet the schedules when there is a penalty of \$1000 or possibly \$2000 staring us in the face, why, we make every effort to meet them, and in a case like this where there are weekly reports that have to be prepared on the job that compared the actual percentage complete with the scheduled percentage complete, and the AEC were very insistent that we do everything possible to keep on that schedule.

Now, in our contract, there is provisions in all government contracts, that give us relief in case of

(Testimony of R. H. Madsen.)

things that are totally beyond our control, such as [1431] unusually severe weather, changes in design, changed conditions, strikes, and such as that, which we are relieved from because it is impossible to fix that into a figure.

Q. I am showing you, Mr. Madsen, two documents which have been admitted in evidence here as Plaintiff's Exhibits 21 and 22. Are you familiar with those documents? A. Yes, sir.

Q. Now, the chart which is here in the left-hand side of it on each of these, shows a breakdown of the lump sum item into component parts. What is the reason or purpose that that is done, Mr. Madsen?

A. Well, this is done at the request of the owner and with their cooperation and our cooperation in arriving at an agreed breakdown for payment purposes, and also an agreed progress schedule that they are satisfied if we follow that schedule we will be able to meet their requirements for completion dates and that we will get paid as we go along in accordance with a definite arrangement.

Q. Is it necessarily true, Mr. Madsen, that the figures which are shown opposite each of these component items of work coincide in all instances with your bid estimate of that particular item?

A. No, sir, this is a condensation of the total breakdown [1432] and it is set up for the purpose of progress and payment and it would have some variation.

Q. I am showing you that which has been marked as Plaintiff's Exhibit 24, will you state if you are

(Testimony of R. H. Madsen.)

familiar with that document (shows paper to witness)?

A. Yes, sir.

Q. Did you assist in its preparation?

A. Yes, sir.

Q. Now, is that the type of document, Mr. Madsen, which is prepared just for a court case, or is that something that you would find on almost any construction project?

A. This is more or less a standard comparative schedule method for recording your actual scheduled progress against your actual progress, against your scheduled progress.

Q. Do no projects keep and maintain a chart of that type as a part of their normal business activity?

A. It's either kept on this form or it may be kept on a graph form; actually, it's the same information. This is the form that we used quite extensively in our work.

Q. Is it possible, Mr. Madsen, to determine from a chart so prepared, the period of time that you are either ahead or behind of scheduled progress at any particular period? [1433]

A. Yes, sir.

Q. And if you will read that chart, Mr. Madsen, and tell us what was the period that this job was behind its scheduled progress as of March 22, 1956?

A. We were 18 days behind schedule.

Q. And what was the period of time behind schedule as of October 1 or September 30, 1956?

A. 128 days behind, as near as we can, that is, as close as we can read it, from the graph.

(Testimony of R. H. Madsen.)

Q. Now, you have stated that you assisted in the preparation of this chart. Why was it, Mr. Madsen, that you ceased to chart the actual progress as of October 1 and merely used an extended line beyond that, based upon estimate?

A. Well, the one reason was that this presentation of our estimated losses was made up on the 11th of October, which was the end of the month, but the main reason was that by this date we had reached a rate of production which was comparable to our scheduled rate of production for the same work that we were into at that time. The strike effects were over. From that point on we felt that we were pretty much on our own again, as far as effects of delays, and increased cost due to the strike.

Q. Mr. Madsen, as assistant district manager of the Seattle district, did you have occasion to visit this particular [1434] project? A. Yes, sir.

Q. Will you state with what frequency you visited it?

A. I was at the job approximately one or two days a month throughout most of the life of the job, except during the strike period I was only there one time.

Q. Did you have any contact with the project other than by actual visits yourself?

A. Yes, sir.

Q. How? A. By frequent telephone calls.

Q. With what frequency would you be in contact with Mr. Reed, as the project manager?

(Testimony of R. H. Madsen.)

A. Well, it is just a guess, but as far as I could say offhand, at least every other day during the three times a week, during the main part of the work.

Q. To your knowledge, Mr. Madsen, were there any delays which occurred in the period from the inception of this project up till March 22, 1956?

A. Yes, sir.

Q. What were those?

A. The sheet metal strike of two days, and there was a delay in pouring the concrete for the sewer in 100-F, on account of radio-active problems, and also on account of the unusually severe weather. There was, also, [1435] a delay that we encountered of about 16 days, due to the unusually severe weather.

Q. What was the reason that weather delayed the job at that time?

A. In the early part, as we were opening up the foundation work and getting the concrete work started; and we all know what we are up against when we are trying to pour concrete in unusually severe, cold weather; we can't keep the frost out of the ground without extensive preparations, which you don't make for a normal operation.

Q. After the commencement of work on or about June 17, 1956, until the latter part of September, let's say the 30th of September, 1956, what, if any, reasons for delay do you have knowledge of other than those attendant on the strike?

A. Besides the Operating Engineers' and Team-

(Testimony of R. H. Madsen.)

sters' strike, there was a Carpenters' strike that followed immediately after the end of the Operating Engineers' and Teamsters' strike, to the extent of twelve days.

Q. All right, other than that do you know of any other reasons for delay, other than those which related to the Teamsters' and Operating Engineers' strike?

A. Well, there is a loss in time due to the inefficiency of start-up; again, I don't know whether that is what [1436] you are asking for.

Q. Well, I am asking for other than those which are claimed here?

A. Oh, no others that I have knowledge of, no, sir.

Mr. DeGarmo: May I have Exhibit 45?

Q. I am handing you, Mr. Madsen, Plaintiff's Exhibit 45 for identification. Are you familiar with that exhibit (hands paper to witness)?

A. Yes, sir.

Q. Mr. Madsen, did you make an investigation as to rental rates for office equipment and for engineering equipment?

A. Yes, sir.

Q. What, Mr. Madsen, did you find as to the rental rate for desks?

A. I have a letter here from the DeVoss Desk Company, that we requested from the Seattle office of the DeVoss people, to see what the prevailing rates for rentals on that type of material was, that type item. Desks vary in cost from month to month.

(Testimony of R. H. Madsen.)

according to the condition of the desk, and will vary from two to five dollars per month.

Q. And what rental was used in this exhibit?

A. We used two dollars a month.

Q. That was the minimum rate? [1437]

A. Yes, sir.

Q. What about chairs?

The Court: Are the defendants questioning the rates set out in this exhibit, No. 45?

Mr. Etter: No.

Mr. DeGarmo: If we are not questioning it, all right.

The Court: I don't like to spend too much time.

Mr. DeGarmo: I don't either, if they are not questioning it. This is the first time I have heard they were not.

The Court: Well, I don't doubt that. Go ahead.

Q. (By Mr. DeGarmo): I want to refer next, Mr. Madsen, to Exhibit No. 27. Does the record show that I have offered 45?

The Clerk: No, sir.

Mr. DeGarmo: I wish to offer it at this time. I held it out purposely because I had intended examining on it.

The Court: If there is no objection, it will be admitted then, 45.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 45.)

Q. (By Mr. DeGarmo): With reference to Plaintiff's Exhibit 27, Mr. Madsen, I call your at-

(Testimony of R. H. Madsen.)

tention to the [1438] fact that there are rental, or there are operating rates shown there for certain equipment at ten cents a mile. What, Mr. Madsen, is the fair cost of operating a pickup truck of a $\frac{3}{4}$ -ton capacity?

A. We feel ten cents a miles is a fair cost, plus the rental.

Q. Plus the rental? A. Yes, sir.

Q. In other words, the ten cents is operating?

A. Yes.

The Court: What do you include in operating costs, gas and oil?

A. Gas and oil, lubrication, tires.

The Court: Tire depreciation? Wouldn't tire depreciation be part of the rental? A. No.

The Court: No? All right.

A. The rentals that the truck rental from Seattle charge is $5\frac{1}{2}$ cents a mile, plus gas and oil, or $5\frac{1}{2}$ cents per mile, plus gas and oil, on comparable pickups.

Mr. DeGarmo: The record should show that that referred to Item No. 3.

A. The Hertz-U-Drive people charge us for the vehicles we rent, they charge us \$9.00 a day, and they charge us \$8.00 a day and 9c a mile for a sedan or passenger car. [1439]

Q. (By Mr. DeGarmo): Well, that includes the profit to them, doesn't it? A. Yes, sir.

Mr. DeGarmo: This next testimony will relate to Item No. 8. May I have 29?

Q. Mr. Madsen, I am handing you Plaintiff's

(Testimony of R. H. Madsen.)

Exhibit 29. Are you familiar with the rate commonly known as AGC and AED for rental of equipment and automotive equipment?

A. Yes, sir.

Q. Will you state, Mr. Madsen, what use is made of those rates in the construction industry generally?

A. Well, that is rates that are used to rent equipment to other firms and other outsiders, and it is rates that we have to pay to outsiders for equipment we rent on the outside.

Q. Do you have occasion in the Seattle district from time to time to rent equipment?

A. Yes, sir.

Q. And when you do, what rates do you pay?

A. Generally, we pay the AED rates.

Q. And do you have occasion from time to time in the Seattle district to lease company-owned property, equipment of this type, to others?

A. Yes, sir. [1440]

Q. By "others," I mean other than joint venturers or your own subsidiaries?

A. Yes, sir.

Q. And when you do, what rates do you charge?

A. Approximately AED.

Q. Now, Mr. Madsen, are you familiar with what has been referred to here as the equipment pool?

A. Yes, sir.

The Court: I will take a recess before you go into that.

(Whereupon, a recess was taken for a period of ten minutes.)

(Testimony of R. H. Madsen.)

Q. (By Mr. DeGarmo): Mr. Madsen, I had just asked you a question concerning the automotive or the equipment pool. Is there such a pool operated out of the Seattle district? A. Yes, sir.

Q. Now, under the administrative procedure of the company who decides whether equipment is to be charged to a particular project when placed on that project?

A. In special conditions they are decided by the district manager.

Q. In the instance of this project, the Hanford Works, was there some decision made as to whether equipment rental should be charged to the project during the [1441] period of the Engineers and Operating Engineers strike? A. Yes, sir.

Q. Or Engineers and Teamsters strike, rather?

A. Yes, sir.

Q. And what was that decision?

A. It was decided not to charge rentals to the project or withhold rentals to the project during that time, except for the pickups that were actually used.

Q. Why was that done, Mr. Madsen, if you know?

A. Well, it was done, primarily, to keep the job on as even a keel as it could, to prevent management, and so on from getting discouraged and losing interest in the work, which develops, and not knowing what was going to be recovered or what was going to be the outcome, it was deferred until a later date.

(Testimony of R. H. Madsen.)

Q. On this pool which is operated, does that always operate at a profit in the Seattle district?

A. No, sir.

Q. I think we have already had some testimony that it didn't operate at a profit in the Seattle district last year? A. Yes, sir.

Q. And was that the first time that that has occurred, to your knowledge? [1442]

A. I don't think I could answer that. It's never an excessive item, if it works right, why it should come out around there, break even.

Q. Well, in the determination of whether you make a profit or loss, is there included in it the rentals which you receive or the rentals to others in the district? A. Yes, sir.

Q. And that is a part of the determination as to profit or loss to that particular district?

A. Yes, sir.

Q. When you rent out of the equipment pool, do you rent at the company rates? A. No, sir.

Q. What rates do you use?

A. In general, we use AED or a modification, depending on if there are special conditions, why, they are worked out on a special arrangement.

Q. Mr. Madsen, did you assist in the preparation of the document, Plaintiff's Exhibit 29, which is in front of you?

A. This was prepared pretty much on the job site, with our job site personnel.

Q. Now, you will note that this exhibit is prepared on a 90-day basis, is it not, that is, as to the

(Testimony of R. H. Madsen.)

equipment which was on the job during the entire period of the [1443] strike? A. Yes, sir.

Q. Have you made a computation as to what would be the result if it was computed on a 98-day basis? A. Yes, sir.

Q. Will you state what that result would be?

A. Basing the 90-day period on 92 days, since February came in there, I didn't actually run it out on the calendar, but assuming that the three months' period would be 92 days, and taking a pro rata of 90 days against 98 days, it would increase this total rental on a three months' basis to \$17,682.

Q. Could you tell us what that is in the dollar amount of increase? A. Yes, sir.

The Court: Seventeen thousand?

A. Six hundred eight-two dollars sixty-six cents. I left the pennies off. It would increase it to that.

The Court: It would increase it to that?

A. It would increase it to that, and the amount of increase would be \$1,085.87.

The Court: I didn't get that last?

A. \$1,085.87.

The Court: Oh.

Mr. DeGarmo: Can I have plaintiff's Exhibit 30? [1444] This testimony has to do with Item 12, Mr. Reporter.

Q. I am handing you a document which has been identified as Plaintiff's Exhibit 30 (hands paper to witness). Has this document, 30, been admitted?

The Clerk: It was not.

Mr. DeGarmo: I didn't think so.

(Testimony of R. H. Madsen.)

Q. Are you familiar with that document, Mr. Madsen? A. Yes, sir.

Q. Now, will you tell us the basis of the computation there made as to general administrative expense?

A. Well, this is recalculated on the basis that the general administrative expense went on continuously on a more or less uniform basis and, therefore, it's based on an average \$6,550 per day of the net revenue short times the 98 days, at 3%.

Q. Well, why did you use just the period of the three or four months there for the purpose of reaching an average, Mr. Madsen?

A. Well, that was the period that was affected by the strike, or the major part of the strike effects were taking place. That is the period that the books are handled on in order to extend it over the full time we arrived at a pro rata basis on it.

Q. Have you made an alternative computation, Mr. Madsen, using instead of the three months period or four months [1445] period shown on Plaintiff's Exhibit 34 for identification, the full time, that is the full scheduled time of the project?

A. Yes, sir.

The Clerk: I have marked Plaintiff's 53.

(Whereupon, Plaintiff's Exhibit No. 53 was marked for identification.)

Q. (By Mr. DeGarmo): I am handing you Plaintiff's Exhibit 53 for identification, will you state what it is (hands paper to witness)?

(Testimony of R. H. Madsen.)

A. General administrative expense, and it is a recalculation of the previous one and it is based on an average daily scheduled revenue over the full period of the 285 days in 100-F and 315 days in 100-H.

Q. Were those the number of days which were the originally scheduled time for completion of this contract? A. Yes, sir.

Q. And the number of days which are shown on the graphs, Plaintiff's Exhibits 21 and 22?

A. That is correct.

Q. And when you used that alternative method of computation, what did you find was the daily average as compared with Plaintiff's Exhibit 30?

A. The new calculation shows an average daily of \$5,944, compared with \$6,550 used in the previous calculation. [1446]

Q. And using the same method of calculation, that is, the 98 days times the average amount, plus or times the 3%, what do you arrive at?

A. \$17,475.

Mr. DeGarmo: I now offer at this time Plaintiff's Exhibit 30.

Mr. Carey: 30?

Mr. DeGarmo: Yes; 30, and 53, which are the alternative computations of this.

The Court: Oh. Has 30 been offered before?

Mr. DeGarmo: No; it has not. I had reserved offering it waiting for this witness to take the stand, since he assisted in the preparation.

Mr. Carey: Well, it seems to me, your Honor,

(Testimony of R. H. Madsen.)

that we are entitled to know which amount they are claiming.

Mr. DeGarmo: Well, I am claiming the larger amount, but I am offering the Court an opportunity to decide. I can't decide the case; I can only furnish the material, if you want to agree to the larger one.

Mr. Carey: We don't agree to anything; we can't agree until we know what they are claiming.

Mr. DeGarmo: Our claim is already before the Court. We are claiming the amount as set forth in Plaintiff's Exhibit 30. I made that very clear.

The Court: I think 30 should be admitted, and I [1447] can't see any detriment in admitting the other one if the Court should have use for it. It doesn't bind the defendants to anything, of course, either one of them, and counsel says they are claiming the larger amount. All right, they will be admitted, then.

Mr. Carey: Both admitted, then?

The Court: Yes.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits Nos. 30 and 53, respectively.)

Mr. DeGarmo: The next testimony of this witness will relate to Item No. 16.

Q. Mr. Madsen, will you state generally what is the effect upon the progress of work on a job of a prolonged period of shut-down due to a strike?

(Testimony of R. H. Madsen.)

A. It increases the cost tremendously to have to go through another start-up period.

Q. Why does it increase the cost?

A. Well, as Mr. Reed brought out here, your crews are disorganized, your men are not available after a prolonged shut-down for any reason; your supervision has been spread out; your equipment has been partially relocated; and in starting up any kind of a job after it has been shut down, you can't come back with a full crew the first day and you can't get full efficiency out of it [1448] until the men that you have have been able to assemble again, and then organize it into a good, efficient operation. They have to get reacquainted with their plans and get the forms straightened out and clean up the gravel and stuff that has rolled down into the footings, and, in general, it's an expensive operation to start up again.

The Court: In short, it takes time to get a job rolling?

A. Yes, sir.

The Court: To get rolling again after a strike, is that it?

A. That is correct, sir. It is just like you have to hire a new secretary, even; it takes her a little while to find out where to put things and who to see and what calls she can make for you. Just about a month with a new person, even though they are skilled, to get them organized again.

Q. (By Mr. DeGarmo): In connection with the pouring of concrete, is there some difficulty with

(Testimony of R. H. Madsen.)

respect to pouring of forms that is caused by lack of non-use? A. Yes, sir.

Q. And what is that and what causes it?

A. Well, they dry up, and some forms will open up to the point where you can't even use them, you have to [1449] completely, if you have wood forms made out of green lumber, why, over a prolonged period in hot weather they will open up to where you can't use them, especially if they are forms that leave a surface that is exposed to view, and then you have to go back in after they sit for a long time, they will warp out of line even if you had them already to make your pour, you have to go in and readjust them and clean up and retension your she-bolts and line them up and put them in shape to pour.

Q. I am handing you, Mr. Madsen, Plaintiff's Exhibit 33, will you state if you are familiar with that exhibit (hands paper to witness)?

A. Yes, sir.

Q. Did you assist in the preparation of the exhibit? A. I did.

Q. You are familiar with the theory of it?

A. Yes, sir.

Q. Yesterday during the examination of Mr. Nelson, I believe it was, the suggestion was made that instead of using the actual cost of labor up to March 31 of 1956, that you should have used the estimated cost since you have used the estimated cost of materials in the second sheet when you are dealing with materials. Now, have you made a com-

(Testimony of R. H. Madsen.)

putation showing what would have happened [1450] if you had used the estimated figures which counsel brought out yesterday? A. Yes, sir.

The Clerk: Plaintiff's 54.

(Whereupon, Plaintiff's Exhibit No. 54 was marked for identification.)

Q. (By Mr. DeGarmo): I am handing you Plaintiff's Exhibit No. 54 for identification, will you state what it is (hands paper to witness)?

A. Computations of excess labor cost due to strike using bid estimated cost per cubic yard.

Q. Now, this first figure that appears, "Actual Cost From June 6 to September 30, 1956," does that appear upon Plaintiff's Exhibit 33?

A. Yes, sir.

Q. And in the 100-F area?

A. That is right.

Q. And is the \$19.41, which appears here, the estimated cost which was used for labor?

A. Yes, sir.

Q. And what is the \$39.71, does that also come off Plaintiff's 33? A. Yes, sir.

Q. And using the estimated cost as distinguished from the actual cost to March 31, what did you find? [1451]

A. For 100-F area the labor cost would be \$45,-735.90.

Q. Now, how much is the company claiming on Plaintiff's Exhibit 33? A. \$25,458.90.

Q. Now, why is it that you reach that result, Mr.

(Testimony of R. H. Madsen.)

Madsen, if you use the estimate you arrive at so much larger a figure?

A. Well, we absorb the costs of the start-up of the first start-up, in the method of calculation that we submitted under the original presentation. Those costs on the start-up are, naturally, much higher than they are after you get under way and get your efficiency going, and we didn't bill anything that happened prior to the time of the strike, we are not intended to recover any of that.

Q. And this \$28.41 figure which appears in Plaintiff's Exhibit 33 included your start-up costs?

A. Yes, sir.

Q. Had this strike not occurred, Mr. Madsen, and you had been able to continue your operations and the pouring of concrete during the remainder of March, April and May until the schedule showed it should have been completed, what would have happened to that cost per yard of \$28.41?

A. It would have kept coming down until the end of the job, [1452] the average for the job, if everything could have worked without interruption, and so on, should have been approximately \$19.41 for the average cost during the life of the job.

Q. Now, have you made a similar computation with respect to the 100-H area? A. Yes, sir.

Q. And what did you find as to the 100-H area when you used instead of the actual cost to March 31, 1956, the estimated labor cost?

A. The revised calculation shows \$41,297.86, against the \$41,830.01.

(Testimony of R. H. Madsen.)

Q. Now, in the case of the 100-H area, your labor costs to March 31, '56, your actual labor, was, technically, slightly less than your estimate, was it not?

A. Yes, sir.

Mr. DeGarmo: I offer Plaintiff's Exhibit 54 as illustrative of the witness' testimony upon this point. We are not claiming the additional amount, to make that clear, we are still claiming the amount shown on Plaintiff's Exhibit 33.

The Court: Well, it will be admitted to illustrate the testimony just given.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 54.) [1453]

Q. (By Mr. DeGarmo): Mr. Madsen, during cross-examination, I think, of Mr. Reed, counsel for the Operating Engineers, as I recall, asked why—no, I believe it was Mr. Carey—asked why the claim as originally submitted under this item had been changed. Did you assist in preparing the original claim as set forth in the original bill of particulars?

A. Yes, sir.

Q. Now, will you answer that question as to why it was changed?

A. That original billing was made up the 11th of October and at that time we didn't have all the information, we didn't have the whole picture worked out to where we could see just what had happened to us, and we used, then, an arbitrary efficiency loss of 15% which the faster we got time to go in and analyze the actual cost figure, why, we

(Testimony of R. H. Madsen.)

came up with the revised calculation that we have definitely to substantiate it.

Mr. DeGarmo: This next testimony, for the record, will relate to Item No. 11.

Q. Mr. Madsen, will you state, first, if there is a customary rate of overhead and profit in use in the construction industry?

A. There is on standard work, extra work orders and negotiated work. [1454]

Q. Will you state what that rate is?

A. It's 15% overhead and 10% mark-up.

Q. Now, in work which you do for the United States Government, the various agencies of the government, such as the Army, the Navy, the Air Force, the Atomic Energy Commission, the Bureau of Reclamation, what rate do you receive as to overhead and profit on work that is considered as extra work not included in the contract?

A. Fifteen per cent and ten per cent, in general. There are a few isolated cases might be special, but in general, it's fifteen and ten per cent.

Q. Upon this particular project do you know what rate was received for overhead and profit on extra work orders to the Atomic Energy Commission?

A. Fifteen and ten per cent on our own work.

Mr. DeGarmo: Could I have Plaintiff's 49, please?

Q. I am handing you Plaintiff's Exhibit 49 for identification, are you familiar with that document (hands paper to witness)?

A. Yes, sir.

(Testimony of R. H. Madsen.)

Q. Will you state what the document is?

A. This is a tabulation whereby a loss of profits is arrived at.

Q. And how do you go about in this instance arriving at the mark-up or loss of profits? [1455]

A. Well, this tabulation lists the amount of the individual items as presented in these documents and totaled up to \$165,000 on which a 10% mark-up is placed for profit.

Q. Is there already included in one item of the exhibit the overhead item which you have testified is customarily 15%? A. Yes, sir.

Q. So that that is not shown as a separate item?

A. No, sir; that comes up with a total claim of that, of \$182,515.77.

Mr. DeGarmo: I offer the exhibit as illustrative of the witness' testimony.

Mr. Carey: What is that one?

Mr. DeGarmo: This is the computation.

The Court: Is that No. 55?

The Clerk: No, sir; it's 49.

Mr. DeGarmo: I don't think I offered it because I was waiting for this witness to testify.

The Court: It will be admitted, then.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 49.)

Mr. DeGarmo: You may cross-examine. [1456]

(Testimony of R. H. Madsen.)

Cross-Examination

By Mr. Etter:

Q. Mr. Madsen, you testified that you had some discussions in the district office with reference to equipment rentals on this project having to do with their revision I assume to be made later on as to what the project should be charged?

A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. And you heard Mr. Goade's testimony this morning? A. Yes, sir.

Q. Am I correct in assuming that he said that the amount finally charged to this charge was \$689.35? A. Was that Mr. Goade's?

Mr. DeGarmo: I think that was Mr. Nelson that was testifying.

Mr. Etter: Was that Mr. Nelson or Mr. Goade?

Mr. Carey: Mr. Nelson.

Mr. Etter: Mr. Nelson.

Q. Do you know when it was finally determined that an actual charge for the company equipment rent or the equipment rentals, the actual charge to be made to this contract would be \$689.35?

A. Say that again, please? [1457]

Q. I say, when did you become aware, if you did, that the actual charge to be charged against this contract for the rentals of the company equipment was to be \$689.35?

A. As far as I know, that has not been decided yet.

(Testimony of R. H. Madsen.)

Q. Well, the testimony, if I recall it right, and I stand corrected if I didn't, was that the equipment charge that was made to the project was finally \$689.35?

A. That is tentative, though, isn't it, brought out in the testimony here?

Q. That was charged?

Mr. DeGarmo: That was the amount actually charged to date, yes, that is correct.

Mr. Etter: Actually charged, yes.

The Court: What was that amount again?

Mr. DeGarmo: During the strike period.

Mr. Etter: \$689.35.

The Court: All right.

Q. (By Mr. Etter): Is that correct?

A. Okay.

Q. Now, you mentioned, too, that there was a Carpenters strike on this project? A. Yes, sir.

Q. Do you recall when that occurred?

A. It was within one or two days of the close of the Operating Engineers and Teamsters strike. I can look it [1458] up if you would like me to.

Q. In other words, the Engineers and Teamsters strike was concluded and then came a Carpenters strike, is that correct? A. That is correct.

Q. Have you ever tried to make any determination of the losses, if any, that Morrison-Knudsen sustained as a result of the twelve-day Carpenters strike? A. No, sir.

Q. As to loss of efficiency or otherwise?

A. No, sir; it doesn't make any difference in the

(Testimony of R. H. Madsen.)

picture if you have a prolongation of the shut-down, as far as your costs of starting up. If there had been a break in between, then you would have a different situation but if you have got one delay following another, the thing that we are presenting for collection or asking relief on is the extra costs of starting up on account of this shut-down that you put us to.

Q. In actual days, am I correct, that the Engineers and Teamsters strike in actual days of strike, was 76 days? A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. And you are making computations here, are you not, on the basis of 90 and 98 days? [1459]

A. Yes, sir; 98 days.

Q. Yes.

A. We are subtracting twelve days from the Carpenters strike from the over-all delay.

Q. Beg your pardon?

A. We are subtracting the twelve days out, in effect.

Q. Well, are you computing, did you originally compute the entire loss of days at 98 due to the Engineer and Teamsters, plus twelve, or 110 due to both of them?

A. One hundred ten would be a total period.

Q. I see.

A. But we are not charging you for any of those twelve days in any of these calculations where we use 98 days for longevity of the administrative costs

(Testimony of R. H. Madsen.)

or any of the other items are not included in our billing.

Q. You are charging us with 76 days plus another 22? A. Built up.

Q. After the strike is over with?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. But you are charging them to us as actual days of strike, are you not?

A. No; we are charging them to you as actual increased costs due to their effect. [1460]

Q. But, I mean the 22 days in excess of the 76 you are charging them equal with the other days computed on an average?

A. Well, it doesn't work that way when we take the total days involved, does it?

Q. But you have days here that you reduced to, for instance, I notice a number of these exhibits have projected amounts of income from which are derived certain conclusions, each day is treated equally, isn't it, of the 98 days?

A. It is not treated equal but it is taken in the calculation as an over-all picture.

Q. You are not giving us any reduction even assuming that there was some work being performed and some income being derived during the 22 days following the 76 days of actual strike?

A. Yes; we are giving you the benefit of it in this calculation. There is 12 days in there that we are not billing you for and you are getting the ad-

(Testimony of R. H. Madsen.)

vantage of the revenue that we were able to recover on the period of the Carpenters strike.

Q. Yes.

A. There is a small amount of revenue came in that, if you will notice.

Q. In this general administrative expense, Item 12, you [1461] have reduced there or, rather, you have a charge there of seventeen thousand on this alternate basis of counsel, \$17,475, and you reach that by what you call an average daily schedule of revenue, isn't that correct?

A. That is correct.

Q. In other words, the time of the job divided into the projected revenue to be received?

A. That is correct, but that is an alternate calculation, it applies only to administrative costs.

Q. You are applying it only to an administrative claimed item?

A. On this special item only, because it is a possibility of a question, and that is why Mr. DeGarmo asked if we should work that one up to put into the record, and it is a little different situation than the rest of the work is.

Q. Originally in your claim for loss of profits of some \$64,000, you used a similar type of computation to determine, did you not, in your original claim or amended claim where you asked for \$64,000 or \$65,000 loss of profit? A. No, sir.

Q. Well, didn't you take the scheduled revenue during the three months of the strike and take from that or determine a daily scheduled revenue, and

(Testimony of R. H. Madsen.)

then charge against [1462] us in your bill of particulars 10% of that amount or 640 some thousand dollars?

A. No, but you are confusing the picture there. That calculation was made during the period of time that the strike was affecting, and it was not over the whole life of the job.

Q. Yes.

A. So, you have got two problems there that you have got to keep straight.

Q. Not the exact figures, but you used a similar system of computation, is what I am trying to get at?

A. No, sir.

Q. Well, haven't you arrived here at a daily average scheduled revenue?

A. We have arrived at it over just the period affected by the strike.

Q. But, I mean, you have gone first, as I understand?

A. Well, now, I can't see which ones you are looking at, and you get two of them mixed up, then I am going to get mixed up on my testimony.

Mr. DeGarmo: Give him the exhibits there.

Q. (By Mr. Etter): Well, that is 12 and 30, I believe, is it, 12 and 30?

The Clerk: You aren't referring to 12, are you? [1463]

Mr. Etter: Oh, this is it.

The Clerk: Exhibit 30 and Exhibit 53 are the two exhibits.

Mr. Etter: Oh, yes.

(Testimony of R. H. Madsen.)

The Court: 30 and 53 were the two on general administrative expense.

Mr. Etter: I think it's in the evidence.

Mr. DeGarmo: The original is in the file, Mr. Etter, we never did present that before. There is a copy of it in the amended bill of particulars, I believe. I will give him a copy of that amended bill of particulars so that he has all three of them.

Mr. Etter: Your Honor, I am referring to the amended bill of particulars, page six, of the amended bill of particulars.

The Court: All right.

Q. (By Mr. Etter): These two exhibits which are the alternative suggestions, now, what I was wanting to inquire and I am referring here now for the record to this bill of particulars in the amended complaint which Mr. DeGarmo supplied me here, to Item 11, Mr. Madsen, where it appears that in computing loss of profits, original scheduled revenue has been totaled for the months of April, May and June; do you follow me there?

A. That is correct, yes, sir. It's the period of the [1464] strike.

Q. Oh, yes; that is just the period of the strike, but what I am saying, a similar method of computation was used in not exactly the same, but a similar method was used in determining what the daily scheduled revenue was here for Item 11, as shown in Exhibit 53?

A. No; it's similar on the first calculation.

Q. All right, on the first calculation, then.

(Testimony of R. H. Madsen.)

A. Yes, sir, and that is applied to the period that was affected by the strike.

Q. Yes; original scheduled revenue, and then you are referring now to similar?

A. Yes, sir.

Q. Now, how is 53 different in principle?

A. Well, 53, on account of the general administrative expenses that pertain to the Boise office and our Seattle district office on the overhead setup.

Q. Yes.

A. That goes on pretty much as a uniform thing. It has to be established as the setup of your operations, based on the volume of work you expect you are going to be able to do.

Q. Yes, but you reached it by taking a percentage of the originally scheduled daily revenue, isn't that how you reached that? [1465]

A. Here is how we worked it out, right off of the schedule here we took the scheduled starting date and the scheduled completion date, 285 days, I think, on F, and half a month longer on H, 315 days on H.

Q. Correct.

A. (Continuing): And we took this for an average because the overhead and administrative situation is a continuing thing that has to be set up based on the over-all volume of work that you expect to do.

Q. Yes, and, of course, the averages included——

A. (Interposing): Do you want these?

Q. No; the average included, did it not, or contemplated that at the end of March the projected

(Testimony of R. H. Madsen.)

revenue was behind about some 240 odd thousand dollars?

A. Well, now you are going back to the original presentation. Net revenue short at the end of April was \$240,000.

Q. The projected, the actual revenue, was short of the projected revenue by that amount, isn't that correct?

A. That is correct.

Q. Now, you referred to a claim that has been made to the government. What does that claim pertain to, particularly?

A. It pertains to the mechanical installation of the pumps proper, the physical set-up of the pumps, and I can [1466] review what testimony here Mr. Nelson gave, if you would like, that in the bidding we take bids from the prospective subcontractors, one group of the mechanicals and the other group of the electricals, and we contact the possible people that are interested and ask them if they would like to submit a bid, and if they indicate they are going to, why, we wait until we get their bids or we figure on taking their bids into consideration in whoever comes in with the lowest bid and on this particular problem here that developed when the time required to mail our bid in arrived, we had not received all of the quotations back in from the mechanical subcontractors, mainly the University Plumbing and Heating.

Q. All right.

A. (Continuing): And we knew we were going to get a quote, and what we used then in presenting

(Testimony of R. H. Madsen.)

our bid and getting it into the mail in time was a figure of our own, an approximate figure that we felt was a safe figure, figuring that we would revise it by telegram which has to be done frequently because a lot of times you get these quotes at the last minute by telephone and you don't have time to get them into your bid and mail it in; so what happened on this set-up here, we had our bid submitted and we got this telephone quote from [1467] the University Plumbing and consolidated that into our figures, and it was a mechanical quote, supposedly including the cost of installing the pumps.

It went on and we sent our telegram on it reducing our bid by about \$129,000; I will give you \$129,520.

Q. I see.

A. (Continuing): And when we got their confirmation of their bid, which is the customary way they do, they send in a letter of confirmation.

Q. You are referring to University Pumps now?

A. Yes; we got their confirmation in, we got lined up to write the subcontract agreement up, and then they indicated that their quotation did not include the millwright work.

Q. I see.

A. (Continuing): And we discussed it with them and they claimed that they never had it in their figure and rather than get into litigation and difficulty over that, or create a situation that might tie the job up, and so on, why, we went ahead then and did the millwright work ourselves.

(Testimony of R. H. Madsen.)

Q. Have you ever brought any action against this subcontractor claiming liability of the subcontractor?

A. No, sir; no legal action has been taken against them.

Q. Did you make any claim to them at [1468] all?

A. Oh, we had meetings with them and had strong discussions, if you know what I mean, on that.

Q. They refused to pay?

A. And they refused to take it.

The Court: Pardon me; do I understand your testimony correctly that for the reasons you stated here, for the reason of policy, and so on, you thought it was the best thing; you actually entered into a written subcontract on the basis of what they contended rather than what you did so you wouldn't have any suit, now?

A. No; we entered into a contract agreement and we took that on ourselves, and later on we presented the problem to the AEC for a claimed error in bidding, and that was forwarded on to their Washington office and they ruled administratively that they could not take care of it on account of the time limit, for one thing, a technicality. It had gone beyond the required time, and we appealed that and it is in the controller's office at the present time. It has been there for, oh, I don't remember the exact time, but some time before Christmas.

Q. (By Mr. Etter): To follow up his Honor's

(Testimony of R. H. Madsen.)

inquiry, what actually happened, you did sign a contract with the subcontractor that you thought included these items? [1469]

A. No, sir; we did not sign a subcontract. We had their telephone bid.

The Court: A telephone bid was made, is where the error came in, in a telephone conversation.

Mr. Etter: I see.

Q. Now, is this claim that you have concerning only that item?

A. That is the only claim outstanding.

Q. That is the only claim outstanding? You haven't made any claim here for loss because of unusually severe weather?

A. What do you mean, for money?

Q. Yes.

A. We only get an extension of time for that, and we are not billing you folks for any cost involved prior to the start of this strike.

Q. I see.

The Court: I was going to ask a while ago, and I thought I had better not chip in too much. Did you ever ask for extensions of time?

A. Yes, and we eventually got extensions of time to take care of this loss in efficiency, but we never got it.

Q. (By Mr. Etter): That is right, because of the strike?

A. Because of your strike, they wanted to only give us 26 days and if we could only have gotten 26 days there would [1470] have been this additional

(Testimony of R. H. Madsen.)

time where we had a loss in efficiency in start-up that would have been billed to us as \$1,000 a day on each billing at the end.

Mr. DeGarmo: You said "26," do you mean "26" or "76"?

A. Seventy-six, pardon me.

The Court: The Court will recess until 2:00 o'clock.

(Whereupon, court was adjourned until 2:00 o'clock p.m. on February 26, 1958.) [1471]

Wednesday, February 26, 1958—2:00 o'Clock P.M.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit:)

R. H. MADSEN

recalled as a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Etter:

Q. Mr. Madsen, I think you testified that you had personal knowledge of an application for extension that was made with regard to completion of this contract? A. Yes, sir.

Q. And do you recall when that extension was applied for? A. Well——

(Testimony of R. H. Madsen.)

Q. (Interposing): Oh, approximately?

A. Shortly after the end of the strike.

Q. Shortly after the end of the strike? It would be in the fall, then, would it not, of 1956?

A. Well, of course, we put them on notice. I don't know whether it was in writing or verbally, at the time the [1472] strike started that we were into a strike and called attention to the fact that it was beyond our control and we would be requesting an extension of time to cover it.

Q. I see, and an extension finally was made in writing, I assume? A. Yes, sir.

Q. And do you know for how many days, how many days were requested, how many days extension, if you can tell me?

A. I don't have all the correspondence, but I think I can give it to you.

Q. That is all right.

The Court: Did you deal with the agency down there in your contract?

A. Yes, sir, on 100-F we were granted 186 days.

Q. (By Mr. Etter): Beg your pardon, now?

A. We were granted 186 days.

Q. 186 days?

A. And we actually completed the work on March 22nd when it was accepted and the revised completion date required was April 4.

The Court: That is on 100-F?

A. 100-F, yes, sir, and that takes into account a lot of additional things that happened after the October 1st date, such as late delivery on AEC

(Testimony of R. H. Madsen.)

furnished equipment, [1473] and changes, and so on, that had to be made in the installation and the strike and whatever time we had before. It covered the whole life of the job.

The Court: What was the extended expiration date?

A. The extended date was April 4.

The Court: Yes; thank you.

Q. (By Mr. Etter): That was 100-F, I think you said? A. 100-F, yes, sir.

Q. Was it the same as 100-H?

A. No; we were granted 145 days in H, and we had actual completion accepted by the AEC as of April 18, and our revised completion date required would have been April 24.

Q. How many days did you actually use of the 145-day extension?

A. Well, we used all but—which one are you talking about now?

Q. About H. A. We used all but six days.

Q. I see. 139 is the extension, then?

A. That is 18, 24, 139 days were used, right.

Q. Were those extensions requested for reasons other than the strike? A. That is right.

Q. In other words, you say some of these extras, is that [1474] what you were referring to as changes or modifications?

A. Extras, changes, unusual weather, and late delivery of government furnished materials.

Q. I see. A. And so on.

Mr. Etter: That is all, thank you.

Mr. DeGarmo: I have no further questions, your Honor.

(Witness excused.)

Mr. DeGarmo: At this time, if your Honor please, we would like to have published the deposition of Mr. Lee E. Knack.

The Court: For counsel's information I will run till 5:00 o'clock tonight to make up for the two-hour recess.

Mr. DeGarmo: I don't wish to necessarily take the time to read this deposition into the record. It has been stipulated with respect to the amount of the director of labor relations claim, with the exception of the proportion of his salary charged to the job, as I understand it, and that was the 700 and some dollars, I believe \$756.25, and the reason I am asking that the deposition be published is that this deposition covers that item and it is our position that we are either entitled to it as a part of the director of labor relations claim or as a part of general administrative expense. [1475]

The reason we took it out of the director of general labor relations exhibit is because it was included as a part of the general administrative expense. If you would care to have me read it, all right.

Mr. Etter: I don't think so. We don't agree that any damage was sustained. It is not necessary to read it. That is, damage incurred by reason of labor relations.

The Court: Which is it?

Mr. DeGarmo: It's Exhibit 6, I believe.

Mr. Etter: No; that is your legal expense. Item 4.

The Court: Oh, director of labor relations?

Mr. DeGarmo: Yes; the original amount in the bill of particulars included an item of \$756.25 which was the proportion of Mr. Knack's salary during the time that he was working trying to settle this strike.

The Court: I see.

Mr. DeGarmo: And we submitted an amended bill on that which eliminated that item because it was pointed out that that was included as a part of general administrative expense and it would be a duplication.

The Court: I see.

Mr. DeGarmo: And this deposition supports that item.

The Court: In the amount of?

Mr. DeGarmo: \$756.25. [1476]

The Court: All right.

Mr. Etter: Which is, however, in the general administrative expenses.

Mr. DeGarmo: That is correct; we are not entitled to it both places, but we are entitled to it, I believe, one place or the other.

The Court: I see.

Mr. DeGarmo: And I would like to have it stipulated that this deposition may be considered as though read in evidence.

Mr. Etter: It may be so stipulated.

The Court: All right, it may be considered as part of the record then, of testimony. I know there are different practices in different courts with ref-

erence to depositions, some of them admit them in evidence as exhibits, and I haven't any quarrel with that method, particularly. It always seems to me that they are either testimony or not, and should be part of the record, if you want this as an exhibit.

Mr. DeGarmo: I would prefer to have it considered as a part of the record.

The Court: All right, the Court will consider it, then. [1477]

* * *

DEFENDANTS' CASE IN CHIEF

Mr. Carey: Call Mr. George King.

The Court: Are all the exhibits admitted now up to 55? Are there any that have been withdrawn?

The Clerk: They are all admitted, your [1480] Honor, excepting one of the exhibits that was marked at the early hearing, that is Exhibit No. 5.

The Court: Has that been withdrawn?

The Clerk: Well, it must have been, it isn't around here.

The Court: It just isn't here?

The Clerk: It wasn't admitted.

The Court: All right, go ahead.

GEORGE E. KING

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Etter:

Q. Will you state your name, please?

A. George E. King.

(Testimony of George E. King.)

Q. Could you speak up just a little bit so we can all get it over here, George? Where do you reside, George? A. Spokane, Washington.

Q. And how long have you been a resident of Spokane, Washington? A. All my life.

Q. All your life? And will you tell me where you have been to school?

A. Public schools here in Spokane, and business college here in Spokane. [1481]

Q. Public schools and business college here in Spokane? And did you have any other further training beyond business college? A. No, sir.

Q. And what training, or, rather, what instruction did you take in business college?

A. Public accounting.

Q. Public accounting? A. Yes, sir.

Q. And how long have you been engaged in accounting, as such, Mr. King?

A. Seventeen years.

Q. Seventeen years? And are you at the present time a certified public accountant?

A. Yes, sir; I am.

Q. And for what length of time have you been a certified public accountant? A. Since 1952.

Q. Since 1952? And you are now, or what is your association or connection with Morris, Lee & Company, certified public accounts, here in the city?

A. I am a staff member.

Q. Beg your pardon?

A. I am a staff member.

(Testimony of George E. King.)

Q. You are a staff member? Have you been a partner in [1482] that firm?

A. Yes, sir; I have.

Q. And for how many years were you a partner?

A. Five years.

Q. Five years? A. Yes, sir.

Q. And when did you cease to be a partner and become a staff member? A. July 31 of '57.

Q. July 31 of '57? And that was by arrangement with the company and with the other partners?

A. Yes, sir.

Q. And you have been with Morris, Lee & Company, did you say, how many years have you been with that company?

A. No; I have been with them 17 years.

Q. I see. In fact, I assume that after you had your training all of your accounting work has been done with that company?

A. Within that firm, yes, sir.

Q. And how old a firm is that, as a firm of certified public accountants, do you know?

A. It was really established in 1912.

Q. In 1912? A. Yes, sir.

Q. And that firm, do you know, at least, has been in [1483] existence, active since that time?

A. Yes, sir.

Q. Mr. Morris is the senior partner, is he not?

A. Yes; he is.

Q. And your offices are located where?

A. In the Old National Bank Building.

(Testimony of George E. King.)

Q. And in Spokane alone, or do you have offices other places?

A. We have branch offices in Wenatchee and in Oroville.

Q. In Wenatchee and Oroville? Up near the Canadian border, is that correct? A. Yes.

Q. All right. Now, were you requested to examine, make an analysis and a report with respect to an examination of certain items claimed by plaintiff here, Morrison-Knudsen, as damages arising out of an alleged breach of contract?

A. Yes; we were.

Q. And prior to the time that you made an examination, will you state whether you were supplied with what purported to be an amended bill of particulars respecting the items claimed as damages? A. Yes; I was.

Q. You were? And were you supplied, also, with certain other documentary evidence or claimed damages? [1484] A. Yes.

Q. And I will ask if, pursuant to that, you went to the City of Seattle? A. Yes; I did.

Q. And did you meet or, rather, did you go to the district office, I think we haven't it here, of the Morrison-Knudsen Company? A. Yes.

Q. And contacted the people there who are in authority, is that right? A. Yes.

Q. And at that time did you make a complete examination, analysis and audit, or if not, will you state what you did do?

A. It was a review; actually it wasn't a complete

(Testimony of George E. King.)

examination or a detailed audit, it was a review of the items.

Q. You say it was not a detailed examination and audit. Will you explain what you mean?

A. Yes, sir. From the standpoint of certain basic documents pertaining to the contract and to the contract accounting, they were not available in the district office since they are maintained in the home office at Boise, Idaho.

Q. I see. And did you, however, with regard to the particular contract that was involved, did you make such an [1485] examination and audit as you considered necessary to determine the accuracy of the items? A. Yes, sir.

Q. And did it appear to you that so far as the records supplied to you, they were sufficient, were they, for you to make an accurate audit?

A. Yes.

Q. And, as I gather, there were some records, the originals of which might not have been available but which you as an auditor were willing to accept on the basis of the accounting records in Seattle?

A. Yes, sir.

Q. And how long did you spend over there?

A. Approximately one week.

Q. Beg your pardon?

A. Approximately one week.

Q. Approximately one week? And that was in examination of all of these records?

A. Yes, sir.

Q. And, as I understand, you received complete

(Testimony of George E. King.)

co-operation from the Morrison-Knudsen people in the making of your analysis and audit?

A. Yes; I did.

Q. Is that correct? A. Yes, sir. [1486]

Q. And did you as a result of your analysis, audit and examination, make an audit return, Mr. King? A. Yes; we did.

The Clerk: Defendants' 56.

Mr. Carey: That is 56?

The Clerk: Yes, sir.

(Whereupon, Defendants' Exhibit No. 56 was marked for identification.)

Q. (By Mr. Etter): Handing you what is indicated as Defendants' Exhibit 56 for identification, I will ask you to examine that, if you will, and I would like you to identify it (hands paper to witness).

A. This is our formal report that was submitted at the end of the review of the accounting records in the bill of particulars.

Q. And is that the formal record or the formal audit which is the result of the analysis and audit report which you made while you were in Seattle at Morrison-Knudsen's office? A. Yes; it is.

Q. And it is composed, is it, and based upon the working sheets and working papers made during your audit? A. Yes, sir.

Q. Which, in turn, was based upon these available documents that you have? [1487]

A. Yes.

(Testimony of George E. King.)

Q. And does it concern, Mr. King, all of the items listed in the amended bill of particulars?

A. Each individual item is covered individually as a separate item.

Q. As a separate item? A. Yes.

Q. And was an analysis made of each one of the separate items in the amended bill of particulars?

A. Yes; they were.

Q. Now, you have been here in the courtroom and you have heard the testimony on behalf of the plaintiff with respect to each of these separate items, is that correct? A. Yes.

Q. And was your examination made of those same items, can you tell that it was from your being here in the courtroom? A. Yes, sir.

Q. It was? And it is all incorporated, is it not, in this identification marked 56? A. Yes; it is.

Mr. Etter: I would like to offer this, Mr. DeGarmo, if you have no objection, at this time, so that as Mr. King goes along and testifies the Court may have the [1488] advantage of it.

Mr. DeGarmo: Yes; with the understanding that he is going to testify concerning it, I have no objection.

Mr. Etter: Concerning all of the items, yes, and I thought I would offer it at this time so his Honor could have it if he wished to follow along.

The Court: It will be admitted in connection with his testimony. If he doesn't cover any part of this, you may move to strike it out, Mr. DeGarmo.

Mr. Carey: Perhaps I ought to intervene here.

(Testimony of George E. King.)

Your Honor will notice it's addressed only to the Engineers, Local 370, but it may be considered as equally applicable to the Teamsters Local.

The Court: Well, that will be understood that it applies to both defendants equally.

Mr. Etter: And I supplied Mr. DeGarmo, I think, the other day with a copy of the auditor's report.

Now, may I have Exhibit 49, Mr. Taylor?

(Whereupon, said document was admitted in evidence as Defendants' Exhibit No. 56.)

Q. (By Mr. Etter): I am handing you Exhibit 49, Mr. King, in conjunction with comparisons that you may wish to effect, having to do with the final result. I will ask you whether you have noted that there have been——

The Court (Interposing): Mr. Etter. [1489]

Mr. Etter: Pardon me?

The Court: If you will give me a chance to find these, I would like to follow you as I go along. I have a rather chaotic filing system here on my desk. Where is 49? 49 is here somewhere.

Mr. Etter: It was the last recap that Mr. DeGarmo offered, your Honor, of the present claim.

The Court: Oh, all right, thanks. I have it now, if you will put them in numerical order.

Mr. Etter: I may lead here a little bit, but it isn't material, Mr. DeGarmo.

Mr. DeGarmo: I doubt if I object.

Q. (By Mr. Etter): You have heard certain

(Testimony of George E. King.)

proposed amendments being made by counsel and certain agreements, have you not, as to some of the final figures which you originally considered which were in the Plaintiff's amended bill of particulars?

A. Yes.

Q. And I might say to you that although if you haven't kept track of it that Exhibit 49, Mr. DeGarmo informs me is the present claim as to each one of the items which you have listed on which you made an analysis, do you understand that?

A. Yes.

Q. I will leave it there with you probably, to make it a [1490] little more expeditious in handling this examination.

The Court: This 49 includes all of the changes either in the bill of particulars or in the course of the trial here, is that correct?

Mr. DeGarmo: That is correct, and the changes that were made during the trial, I think, are all incorporated in 49.

Mr. Etter: All right.

Q. Now, I notice that in the report here you have attached, have you not, Mr. King, in the last sheet of your audit which is Exhibit 56, is that what that one was?

Mr. DeGarmo: 56, that is right.

Q. (By Mr. Etter): 56, Exhibit A, you have summarized, have you, the various items set out in the amended bill of particulars?

A. Yes, sir.

Q. So that a comparison can be effected with

(Testimony of George E. King.)

regard to your Exhibit A, which is your summary, with the exhibit that you have there numbered 49?

A. Yes.

Q. Is that correct? A. Yes.

Q. All right. And, likewise, you have indexed it, have you not, commencing on page one, with respect to each item which is claimed in the amended bill of particulars [1491] and has been reduced to a final claim as indicated by counsel in Plaintiff's Exhibit 49, is that correct? A. Yes.

Q. Now, when you made this analysis and audit, can you tell me from the standpoint of auditing, did you follow established, accepted procedures of auditing? A. Yes; I did.

Q. You did? A. Yes.

Mr. Etter: I might say this, your Honor, at this time: Your Honor indicated that if certain of this matter wasn't covered counsel could move to strike it. Now, I notice here that in Item 1 the amended amount which counsel has submitted in his Exhibit 49 is somewhat less than the amount which was determined by Mr. King's review and, consequently, I see no reason to have him go into an explanation of his Item 1 inasmuch as the amended item, since this trial started, is somewhat less than we found.

The Court: Well, I don't think Mr. DeGarmo would have any objection to instances of that sort.

Mr. DeGarmo: Except I will want to point out why they are less.

Mr. Carey: We agreed on that amount, your Honor.

(Testimony of George E. King.)

Mr. Etter: You see, the reason for that is this: When this audit was made by Mr. King, you will note that in [1492] the amended bill of particulars a claim had been made for \$13,940.28. Mr. King's audit indicated it was somewhat less, \$13,447. Now the plaintiff had reduced it to \$13,389.

The Court: I notice on the final page here, page 14, it's indicated that at least this accountant considered that the total claim of the plaintiff at that time was \$238,181.11, and according to Exhibit 49 it's \$182,515.47, so that there is a substantial difference in there, and I should think that where you concede amounts, or as to any items which you concede, I think I will state tentatively, subject to any objection Mr. DeGarmo may have, that you need not have the witnesses cover those where they are conceded by you as to the amount now claimed, of course, subject to the right of Mr. DeGarmo to cross-examine on them.

Mr. DeGarmo: Yes; I don't see any point in covering them when they are already admitted, except I want to point out why.

The Court: Yes. [1493]

* * *

The Court: May I make this suggestion, I wish to be helpful, if it could be indicated as we go along whether the difference that the accountant has made is dependent entirely upon that difference in time between the actual strike days and the 98 days that the plaintiff computed or, if not, what amount is not involved in that difference?

(Testimony of George E. King.)

Mr. Etter: Fine.

The Court: You see what I mean as to each of these items.

Mr. DeGarmo: I think the audit report itself discloses that.

The Court: Oh, is that right? All right.

Q. (By Mr. Etter): Did you understand?

A. Yes.

Q. Now, first you said here that you, in the analysis that you made, you used the figure 76 days, the actual days of strike, rather than in the projected number of days [1494] followed by the plaintiff of 98? A. Yes, sir.

Q. And is that true, so that we don't have to cover it again about each and every item that involved any computation based on the days of time involved in the strike? A. Yes; it is.

Q. That is right.

The Court: I may interrupt more at the outset than I do later on; I want to be sure I understand this as we go along: Did you then, Mr. King, make any allowance for loss of efficiency because of slow-down after work was resumed?

A. No, sir.

The Court: I see. All right, go ahead. [1495]

* * *

Q. Now, we will turn to Item 8 on the "Equipment Rentals," Mr. King. The amount here is indicated in the bill of particulars, is it not, in the claim made by plaintiff the amount was \$29,592.59?

(Testimony of George E. King.)

A. Yes, sir.

Q. And you determined by your review an amount of \$9,136.79? A. Yes, sir.

Q. Now, did your determination have to do with the actual charges you found in the records against the equipment or the actual charges that would have been made under the procedures used by Morrison-Knudsen?

A. The charges we determined were the actual charges out of the Boise office, had they been charged monthly to the contract at the rates set up prior to the strike.

Q. In other words, had they been charged at the monthly rates set out of the Boise office the total would have been \$9,136.79, in your analysis now?

A. I might clarify that.

Q. All right. [1506]

A. A portion of it, in other words, a breakdown of the equipment, the major equipment rental, within this item.

Q. I see. A. Was computed on that basis.

Q. I see. Now, there was testimony here this morning that thus far, I think, the testimony was that during the strike period the amount thus far that has been actually charged for rental against the equipment is the sum of \$689.35, was that information available during the course of your audit, or not? A. I did not check that item, no.

Q. You did not check that item? A. No.

Q. Your item that you are giving here now is

(Testimony of George E. King.)

one based, as you say, on the rental rates chargeable for the equipment use had it been so charged?

A. At the regular rates that would have been charged out of the Boise office.

Q. I see. Now, you have in your review, you have indicated "A. Major Equipment; B. Minor Equipment; C. Owned Concrete Forms; D. Rented Concrete Forms; E. Scaffold and Move-in and Move-out" totals, have you not? A. Yes, sir.

Q. Now, with regard to the major equipment, will you tell [1507] us what procedure you followed and in what manner you reached the amount that could be chargeable, in your opinion, against the job by the sum of \$4,427?

A. This was major equipment, company owned, which was rented to the contract, to the Boise office. In computing this we used the same time element as was originally in the bill of particulars, either a two and a half months' basis or a three months' basis, and computed it at the rates that would have been used had the Boise office continued charging the contract job at the rental rate used preceding this strike.

Q. In other words, you used the same basis of two and a half months and three months, did you, in computing? A. Yes, sir.

Q. That allowable amount under the practice that you found existing? A. Yes.

Q. Now, why was it that you arrived at this method, have you a reason for that?

A. On the basis that this was the actual expenses

(Testimony of George E. King.)

that would be incurred had they continued; in other words, through the strike period the Boise office would have continued charging the contract with the rental rates just as the rental rates that they would have sustained in the contract itself. [1508]

Q. I see. And did you note the manner in which the company had reached their figure under "Major Equipment" of \$15,913.75? A. Yes, sir.

Q. And how had that been achieved?

A. It was computed at the time element, two and a half or three months, in the case of a particular piece of equipment, at rentals of the AGC or the AED schedules which were not available to us at the time we made our examination.

Q. There were no charges against this contract, however, at the time of your examination based upon any AED or AGC schedules?

A. No, sir.

Q. Will you state in your opinion what you believe was the more realistic determination of actual loss and cost?

Mr. DeGarmo: Just a minute, if the Court please, I think that is the Court's decision, not this witness'.

Mr. Etter: Well, I think under accounting procedure he can give his opinion. The Court may not be bound by it.

The Court: If he feels that he can express an opinion as an accountant as to what is the proper accounting practice, I will permit him to answer

(Testimony of George E. King.)

that. Of course, it's [1509] for the Court to determine, ultimately.

Mr. Etter: That is correct.

The Court: All right.

Q. (By Mr. Etter): Would you give us your opinion, Mr. King?

A. Well, in my opinion it would be the rentals that would be sustained throughout the period of the strike, that would have been sustained otherwise without the strike, which would have been the Boise rental rates.

Q. I see. Now, going to "B," the minor equipment, there is indicated in the bill of particulars the amount of \$6,888.50. When you examined the major analysis and audit, why, you found \$851.95. Now, will you explain that to us and the reason for so finding it as to your figures?

A. Here, again, on the minor equipment that was itemized in the amended bill of particulars, we identified the equipment and followed it through to the assignment to the contract and in the majority of the cases of the items they were assigned to the contract at the nominal valuation of ten dollars and later transferred out of the contract at ten dollars. Thus, the contractor sustained no actual expense for the use of the equipment. In addition to that there was certain minor equipment that was purchased on the basis that the contractor had [1510] sustained the full ten dollars, plus the additional minor equipment that was purchased as an expense, we arrived at the \$851.95.

(Testimony of George E. King.)

Q. I see. And, in your opinion, do you believe that that is in accord with good accounting practice and procedures in your determination?

Mr. DeGarmo: May the record show my objection to this question?

The Court: Yes; it may show objection without repeating.

A. I believe so.

Q. (By Mr. Etter): Now, turning to "C," what is indicated as "Owned Concrete Forms"? Your determination of \$2,317.50 as to that item under the existing procedure had it been charged to the contract, will you explain that and your method in arriving at it?

A. The company-owned concrete forms in the original bill of particulars there was no differentiation made between company-owned and rented concrete forms which we took exception to and excluded the rented concrete forms, the footage that was actually rented from the Universal Equipment Company, leaving the balance of that footage being company-owned and extended at the rate claimed in the amended bill of particulars.

Q. I see. Now, with regard to the rented concrete forms [1511] under "D"?

A. We excluded that item in total, which I think has been excluded now in the amended exhibits on the basis that it appeared later on and was a duplication of charges.

Q. All right. Now, with regard to "E," the scaffold.

(Testimony of George E. King.)

A. That was in the same condition that the rented concrete forms were. The charge for it appeared here and again later on in the bill of particulars.

Q. I see. And the move-in and move-out charge?

A. They remained the same as in the amended bill of particulars.

Q. You charged them as indicated in the records which you found? A. Yes, sir.

Q. But you have heard the testimony here with regard to move-in and move-out costs?

A. Yes, sir; we made no change in this on the basis that the charges of the move-in were duplicated, on the basis that it was moved back to the same job and, therefore, cost exactly the same to move back. [1512]

* * *

Q. All right. Now, turning to Item 11, "Loss of Profit," in the bill of particulars the loss of profits was indicated as \$64,190, and in Plaintiff's Exhibit 49, Item 11, which appears at the bottom of the exhibit, now is indicated as \$16,592.34. I note here in this Exhibit 56 to which I have been referring all the way along, without bringing the exhibit, that you eliminate any loss of profit by your review, is that correct? A. Yes, sir; we did.

Q. All right. Now, will you tell us, first, how, when you made your audit, how the company had computed the loss of profits; explain that?

A. In the amended bill of particulars, Item 11 is computed on an average daily projected revenue.

(Testimony of George E. King.)

Q. Now, this average daily projected revenue, did you tell me from your examination——

Mr. DeGarmo (Interposing): We are not claiming profits on that basis at this time, I can't see the purpose in spending the time on it. [1514]

Mr. Etter: You are still claiming \$16,000, and we are still claiming that you haven't got any. We haven't conceded any yet, so I think I will go ahead with it.

Q. (By Mr. Etter): On this Exhibit 24 did you have the opportunity to examine that in connection with your examination of Item 11, referring to the lost profits (hands paper to witness)?

A. Yes; I did.

Q. You did? And is that the projection that you are speaking about in advising us how the company computed the loss of profits claim?

A. This is a part of it; this is the graph part.

Q. All right, will you go ahead now with your explanation?

A. Well, we projected revenue for the months of April, May and June, they were averaged. I should say the projected revenue for those days less the actual revenue received, was averaged over the days to arrive at a daily revenue average which, in the original or in the amended bill of particulars, was \$6,550 per day.

Q. I see.

A. (Continuing): Based on the 98 days they have extended at a rate of 10% profit the average daily profit and arrived at \$64,190.

(Testimony of George E. King.)

Q. When you examined that, the company in computing the time loss that they indicated here, what factor did [1515] they employ, as you found in your examination, in computing the time loss?

A. In their computation of the time loss?

Q. Yes; in their computation.

A. It was based on projected revenue as it shows and was disclosed by this chart, Exhibit 24.

Q. I see. And I notice in your report that you indicate the company used some particular factors in which you set up the total days behind schedule on October 1st, 1956, as being 128 days?

A. Yes, sir; that is the chart, Exhibit 24.

Q. Now, did you find in your examination that that was the way the company reached their time loss of 98 days?

A. Yes, sir.

Q. I see. Now, what consideration did you give to that method of estimating the time loss or computing the time loss?

A. We recomputed on the average daily basis in view of the fact that they had made several other computations in their computations on average daily earnings, we computed the time back on the average daily revenue produced as compared to the projection.

Q. In other words, you based yours on the actual revenue produced rather than the projection of expected revenue? [1516]

A. A combination of the two.

Mr. DeGarmo: That was not his testimony.

Q. (By Mr. Etter): Well, what did you do in

(Testimony of George E. King.)

reaching your conclusion, how did you handle this matter?

Mr. DeGarmo: They used the average.

Q. (By Mr. Etter): Will you explain what you did?

A. In reaching our time loss element?

Q. Yes.

A. We took the projected revenue as set forth in the exhibit of the company and the number of days it was under construction at those revenue points, arrived at an average per day, a cumulative average per day, in which then we took the revenue received at the cumulative points, divided by the daily average, gave us the construction days or revenue days of construction completed, or based on those averages.

Q. Well, now, could you determine how many days of construction time which was based on the original company estimate had been completed and billed to the AEC on March 31, 1956?

A. On the method I explained, yes, it was 78 days.

Q. Seventy-eight days? A. Yes.

Q. Now, following your method at that time on March 31, how far under your computation was the company then [1517] behind schedule?

A. Based on revenue days, it would be 44 days behind schedule.

Q. Forty-four days behind schedule?

A. Yes.

Q. In which you computed the company then

(Testimony of George E. King.)

was 44 days behind schedule? A. Yes, sir.

Q. On March 31, is that correct? A. Yes.

Q. Now, what did your tabulation, what results did your tabulation disclose, ultimately, after your examination of this element?

A. We came to the conclusion that there should be no loss of profits since for a twofold reason, since with all the rest of the items claimed in the bill of particulars they still would have sustained a loss and there was no justification to us for the percentage used of 10%.

Q. Why not, Mr. King?

A. It was our understanding in the examination that the bill of particulars were reimbursements of costs and if they were reimbursed for all costs they would have been returned to their position had not the strike been encountered. [1518]

Q. Had not the strike been encountered?

A. Yes, sir.

Q. In other words, your position, as I see it, is if there was reimbursements for costs you wouldn't accept a claim for profit?

A. They would have been returned to their position as if there had been no strike.

Q. I see. And, in other words, that position would leave them where they would realize either a normal profit or loss? A. Yes, sir.

Q. Independent of that fact? A. Yes.

Q. Even assuming the total amount of damages claimed in the bill of particulars, can you state whether or not your examination disclosed that even

(Testimony of George E. King.)

crediting that the company would have sustained a loss?

A. Yes, they would have.

Q. In your examination? A. Yes.

Q. Upon the records that were submitted to you?

A. Yes.

Q. I see. Now, Item 12, which refers to the general administrative, oh, I want to ask you this: You have set up, have you not, in your audit report, the method [1519] of your tabulation and the method in which you reached the days of revenue that the company was behind in their contract on March 31?

A. Yes, we have, it appears on pages seven and eight of the report.

Q. And do you, likewise, set down the days that your analysis disclosed, at least from your computations, it was delayed due to the Teamsters and Operating Engineers strike?

A. Yes, sir.

Q. It's all included in this report?

A. Yes.

Q. Now, turning to Item 12 which is indicated as a general administrative expense, the bill of particulars which you had when you made your examination and which is set forth with respect to this particular item at page eight of Exhibit 56——

The Court (Interposing): Before we leave Item 11, as I understand now, Mr. DeGarmo, your claim for loss of profits is simply a straight 10% mark-up on what you claim on all the other 16 items?

Mr. DeGarmo: Correct, sir.

The Court: All right.

Q. (By Mr. Etter): Have you had a chance

(Testimony of George E. King.)

to consider this, the new amended bill, with regard to Item 11 "Loss of [1520] Profits" on 49, Mr. King?

A. Well, again it's an estimate. I feel that from the accounting standpoint that the expenses, reimbursement of the actual expenses incurred, would have placed them in the position they were originally, as if the strike had not existed.

The Court: He has already covered that, I think.

Mr. DeGarmo: That is his view of the law.

Mr. Etter: Well, I want to know if he applies that now to the \$16,000.

The Court: All right, sure. I understood his testimony, anyway.

Mr. DeGarmo: You wanted to get the cost factor.

Mr. Etter: Well, that isn't what I heard him say.

The Court: All right, go ahead.

Q. (By Mr. Etter): Now, in Item 12 "General Administrative Expense," it was indicated in the original bill of particulars a claim of \$19,257, Plaintiff's Exhibit 49 under Item 12, now, claims the same amount. I notice that in your review you have determined nothing allowable and chargeable to that general administrative expense. Now, will you give us your reasons for your position, your analysis and audit in that regard on that item?

A. The amount claimed is a mathematical computation based [1521] on the same theory as Item 11 was originally computed in the amended bill of particulars. I felt at the time that the amount claimed

(Testimony of George E. King.)

for general administrative expenses should have been itemized, the accounting records should have been reviewed, and specific administrative and overhead items set forth, rather than a computation as set forth in Item 12.

Q. Could you find any specific items with regard to that account?

A. I made no attempt to identify any of the administrative expenses.

Q. Were any set forth chargeable to the contract that you found?

A. I am afraid that I can't say, I didn't look for them.

Q. You say that you do not concur in the method used? A. Yes, sir.

Q. Because of that reason, because it is what, a percentage calculation?

A. A percentage calculation on projected revenue or projected revenue expected.

Q. Projected revenue expected?

A. Yes, sir.

Q. I see. Now, Item 13, as I see it, there is no dispute on that item at the present, Mr. DeGarmo, as I compare these? [1522]

Mr. DeGarmo: Apparently not.

Mr. Etter: As I look at Item 14 I see no dispute on that.

Mr. DeGarmo: There is no dispute on that.

Q. (By Mr. Etter): Item 15 has to do with the maintenance of the General Electric Company office. In the bill of particulars it's indicated as \$547.30,

(Testimony of George E. King.)

and amended now in Plaintiff's Exhibit 49 to \$531.76, and I notice it was determined by your review to be \$414.65. Can you tell me whether or not the difference there is as a result of you computing on 76 days and the company on 98?

A. The difference is because it was computed on a 76 day basis.

Q. And there is no other reason than that difference? A. No, sir.

Q. Is that correct? A. No.

Q. Now, going to Item 16, the efficiency loss for labor and supplies.

The Court: Before we go into that, I will take a recess.

Mr. Etter: Fine.

The Court: Ten minutes.

(Whereupon, a recess was taken for a period of ten minutes.) [1523]

The Court: Let's see, were we on Item 12?

Mr. DeGarmo: 16.

The Court: Oh, 16? The last note I have is on 12.

Q. (By Mr. Etter): Now, you had occasion, did you, to consider the item which is indicated in 16, Mr. King, the efficiency loss for labor and supplies?

A. Yes, sir.

Q. And there was indicated in the bill of particulars, the amended bill of particulars, the total sum of \$92,835.29 when you made your examination, analysis and audit, is that correct? A. Yes.

Q. That item, I notice now in Plaintiff's Exhibit

(Testimony of George E. King.)

49, is substantially the same although it is \$89,370.98, you are aware of that? A. Yes.

Q. And your computation indicated a reduced amount of \$38,291.94, is that correct?

A. Correct.

Q. Now, you have in your report a statement that the amounts set forth are the maximum amounts and do not make allowance for increasing cost of paving concrete as an increase item?

A. There is a typographical error there, first, that should be "Pouring concrete." [1524]

Q. Pouring concrete, I see.

A. In other words, the recognized fact that as the rise goes higher the pour goes higher, the costs increase.

Q. You are aware here from the testimony that the pour did not extend above the level of the ground? A. Yes, sir.

Q. Now, did you determine the method of computation employed by the company in making this determination? A. Yes, I did.

Q. And will you tell us what that was?

A. The computation is broken down into two factors, labor costs and material costs. The first section on labor is broken into two different areas, the labor cost at March 31 of '56, the date preceding the strike, and the cubic yards poured to that date, has been averaged to arrive at a cost of labor per cubic yard. The costs through September 30, 1956, have been totaled, subtracting the March 31 costs, arriving at labor costs for the period June 6, '56, through

(Testimony of George E. King.)

September 30. The concrete pour for the same period has been used, arriving at an average cost per yard. The difference between the average cost at September 30, 1956, and March 31, 1956, has been considered as excess cost of labor and applied to the yardage poured during the latter period in both areas, arriving at the increased cost of labor. [1525]

Q. I see. Now, did you determine the amount of concrete which was poured in both areas in your analysis? A. Yes, we did.

Q. And what did you find out with respect to that amount that was poured?

A. The concrete pour records disclosed that in area H 3429½ yards were poured. In area F, 4168 yards were poured.

Q. Now, did you also determine what the original engineering estimates of the pour were?

A. Yes, sir, we did.

Q. And they were what?

A. In area H the estimate was 3092 yards; in area F, 3450 yards.

Q. And did you determine that there had been an excess of pour over original estimates?

A. In both cases there was an excess of pour in area H, 337½ yards in area F, 718 yards, or a total of 1055½ yards.

Q. All right. Could you determine from your examination of the company's methods in determining part of this charge whether any consideration was given to the excess costs which were in-

(Testimony of George E. King.)

curring as a result of the excess pour over the engineering estimate?

A. The excess costs were adjusted only to the point as it [1526] compared to the costs at March 31. In other words, the excess yardage was included in the cost of labor, excess cost of labor computation.

Q. Did the company give any consideration to the excess cost incurred as a result of that pour?

A. As a reduction from their claim, no.

Q. They did not? A. No, sir.

Q. Now, did you also then compute the tabulations of excess labor costs on the same basis as was in the bill of particulars? A. Yes, we did.

Q. Did you make certain adjustments?

A. We did.

Q. And what adjustments did you make?

A. We excluded the cost of the excess pour on a computation basis by taking the actual pour figures from the period of March through September, arriving at cost per yard and excluding that amount for the excess pour during each month which was computed at a percentage basis.

Q. All right, did you convert the pour to the actual concrete delivered on the contract?

A. Yes.

Q. You did? And have you a table in there that indicates [1527] that?

A. Yes, on page eleven of the report it indicates the area H, and on twelve, area F.

Q. What was your purpose in setting out this

(Testimony of George E. King.)

table that you have set out here on page eleven of Exhibit 56?

A. I felt in their computation for the excess labor costs they had given no consideration to the excess pour which I felt was substantially over the original estimate approximately 15%.

Q. I see.

A. (Continuing): In excess of the original estimate, and that the excess costs of that excess pour was not a cost sustained or attributable to the strike period.

Q. And is that the basis of the tabulation which you set out?

A. Yes, the tabulation is computed on the same base as their computation, with that exclusion.

Q. With that exclusion? A. Yes, sir.

Q. And the result which you reached on that tabulation of that exclusion is indicated as being \$29,075.37, is that correct? A. For area H.

Q. For area H? Now, in the F area did you do the same thing? [1528]

A. The identical procedure was followed, yes.

Q. The identical procedure was followed? Which resulted in the amount that has been indicated in your tabulation on page twelve of Exhibit 56?

A. Yes, it totals \$9134.59.

Q. I see. Now, I see that you make a statement that "No statistics or cost data was available to determine the increase in such costs as would occur and produce the final figure in the above computa-

(Testimony of George E. King.)

tions," did you have reference to increased costs in the pour as it rose, by that statement?

A. Yes.

Q. All right, have you any other comments to make with respect to that item as a result of your analysis?

A. The material costs as claimed in the amended bill of particulars, we have excluded from our findings on the basis of the estimated cost, which was from the bid, in arriving at the excess supply costs. In other words, the total job materials for area F was \$38,557.01. The yardage poured in that area was 4168 yards computed at \$6.14, which was the unit cost for supplies in the original bid, extends to \$25,591.52, the excess is the amount claimed for excess supplies as a result of the strike.

Q. I see. Did you make a determination, too, with regard [1529] to the H area?

A. On the same basis, yes.

Q. On the same basis as you described made in the F area? A. Right.

Q. Now, you say, "There is no basis other than that of using the engineering estimates of unit costs in computing the estimate of supplies that would have been used since it appeared in our review that these estimates were substantially less than would have been experienced under regular operating conditions, we have eliminated the amounts claimed for excess supply costs"?

A. Yes, sir. The meaning there is that we had no definite basis to use the \$6.49 rate in area H and

(Testimony of George E. King.)

the \$6.14 rate in the other area, which was the engineering projection of the unit cost on supplies.

Q. I see.

A. (Continuing): And the accounting records themselves, as it has been previously mentioned, it's very difficult to determine any specific accounting costs at any point on supplies since the bulk of the supplies may be bought at the beginning and continue on through the contract.

Q. I see. Now, in both of these estimates, as far as the company's estimate is concerned, and your estimate, they were all used on projected estimated figures, is [1530] that correct?

A. Yes, sir. These last two computations were on the engineers' bid projection.

Q. Now, you were in the courtroom and were aware of my questions having to do with Exhibits 22 and 24, which are projections. I have copies right here, Stan.

Mr. DeGarmo: I think those are 21 and 22.

Q. (By Mr. Etter): Excuse me, they are 21 and 22, which are projection estimates with respect to the various types of work listed in the column having to do with concrete, electrical work, insulation and architecture, and all that, do you not?

A. Yes, sir.

Q. And you heard the testimony indicating that, referring to Exhibit 1, at the stage the strike occurred at the end of March, although the engineering estimate indicated 80% of the pour to be completed, that there was only a percentage of that?

(Testimony of George E. King.)

A. Yes.

Q. And, likewise, a larger percentage, I think, with respect to Exhibit 22? A. Yes.

Q. In the H area? Now, those factors were not, of course, considered in arriving at these amounts in the engineering estimates respecting Item 16, were they? [1531] A. No.

Q. Beg your pardon?

A. I don't quite follow what you mean there.

Q. Well, I mean, actually, as I say, these were based on projected estimates, weren't they, your computations and the plaintiff's?

A. No, our computations on the labor costs were on actual figures from the accounting records.

Q. That is correct.

A. On supply costs the total cost was from the actual amounts from the accounting records.

Q. I see.

A. The amounts estimated as the amounts that would have been incurred for supplies we have eliminated, in other words.

Q. There is no way, is there, of telling what the actual cost of these items of the pour might have been prior to the strike, separate and independent?

A. Of supplies, no; no, sir.

Q. There is not, is there?

A. No sound method of doing it, no.

Q. I see. Is there a sound method, in your opinion, of determining these costs with regard to increased labor costs? A. Yes, sir. [1532]

Q. And is that the fashion in which you worked

(Testimony of George E. King.)

them out? A. Yes, it is.

Q. I see. Now, I think you said not as to material costs? A. Not as to material costs.

Q. I see. Now, as to Item 17, as I understand the original amended bill of particulars is \$7072.64, which has been further amended in Exhibit 49 to \$6432.64, which is the exact figure determined by your review under Item 17? A. Yes, sir.

Q. Is that correct? A. Yes.

Mr. Etter: That is all.

Cross-Examination

By Mr. DeGarmo:

Q. Mr. King, can we establish in basic working rules here, will you tell me, first, what were your instructions when you were assigned to make this examination and review?

A. To determine the costs that were incurred in the accounting records of the contract during the period of the strike.

Q. Were your instructions oral or in writing?

A. They were oral. [1533]

Q. You had no written instructions?

A. No, sir.

Q. Now, will you state that again, what those instructions were?

A. To determine the costs that were incurred by the contract during the period of the strike.

Q. Yes. Now, I noticed repeatedly, Mr. King, in your audit report that you used the word "con-

(Testimony of George E. King.)

tract," let me ask you in your audit which you have here, did you regard this contract for Hanford Works as a separate accounting unit?

A. Oh, from the extent that that was the records that were available to me for examination.

Q. Well, did you regard this project as being independent of Morrison-Knudsen Company as a corporation and organization? A. No, sir.

Q. You did not? A. No.

Q. All right, we will see, some of these will pass very quickly. Item 1, the difference between your figure in your determined amount and that as submitted by the plaintiff is occasioned solely, is it not, by the fact that you use a 5.8 insurance and taxes figure, whereas, the plaintiff used 5.65? [1534]

A. Yes, sir.

Q. In Item 2 which appears on pages two and three of your report, as I understand it, the difference in the first figure which is \$282.48 and \$339.73 is occasioned solely by your use of the 76 days and the plaintiff's use of a 98 day period.

The Court: I didn't just follow that, Mr. DeGarmo.

Mr. DeGarmo: On page two, Item 2, the first item, his determination is \$282.48 and the plaintiff's claim is \$339.73.

The Court: Oh, I see, yes.

Mr. DeGarmo: And I asked him if the only reason for the difference is the 76 and 98 days, to which he answered "yes."

The Court: Yes.

(Testimony of George E. King.)

Q. (By Mr. DeGarmo): Now, in the exhibit and in the bill of particulars on that item, Mr. King, there was an item of rental of office equipment and an item of rental of engineering supplies, is that correct? A. Yes, sir.

Q. And in your audit you have thrown those out completely as not worthy of consideration?

A. As being expenses not incurred on the contract accounting records.

Q. Well, now, let me understand, Mr. King, were you sent [1535] out there just to determine whether there were costs on the record, was that the only thing you were going to determine?

A. That was my basis of the examination, the actual costs that were incurred.

Q. Well, if there was no cost figure on the record, then from your standpoint as an accountant, you discounted the item? A. Yes, sir.

Q. And is it your position as an accountant that if we have a whole room full of furniture here that is being used for courtroom purposes and it has been fully depreciated out so that the owner of it has no costs on his records, that it is worth nothing to him.

Mr. Etter: That is not a proper hypothetical question.

Mr. DeGarmo: It is not a hypothetical question at all.

Mr. Etter: It is, there is not a proper foundation in any of the testimony laid for that type of cross-examination.

(Testimony of George E. King.)

The Court: Well, I think it would be of value, of use rather than value of the property. I will permit him to answer that.

A. Well, it would have a value to it, yes, as an asset. [1536] It may not have any operating expense since it had been fully depreciated out.

Q. (By Mr. DeGarmo): But as an accountant you would not consider that as entering into the profit or loss picture?

A. If it were fully depreciated out, no.

Q. It would just be a nonentity from an accounting standpoint?

A. Yes.

Q. But it does have a use value, does it not?

A. Very definitely.

Q. To the owner of it, and it has even a greater use value if it is fully depreciated, does it not?

A. I don't understand what you mean there.

Q. Well, if it is fully depreciated, he has no costs to charge off against the profit, does he?

A. That is correct.

Q. So that he makes a profit on that item?

A. Yes.

Q. With no offsetting expense item?

A. Correct.

Q. Now, in this case, as I understand from reading your audit report, you have found that all of the furniture had been transferred onto this job at a ten dollar valuation? [1537]

A. Yes.

Q. That was the gross figure?

A. Yes.

Q. And it had been transferred out at ten dollars,

(Testimony of George E. King.)

so as far as from an accounting standpoint, it was zero?

A. On the items set forth in the bill of particulars, yes.

Q. And it was upon that basis only that you just threw the item out from an accounting standpoint?

A. Correct.

Q. And that was the only reason?

A. Yes, sir.

Q. Similarly, Mr. King, with reference to Item No. 3 which has to do with transportation to protect property during strike, which appears on page three of your report, Defendants' Exhibit 56, you eliminated that item entirely for the reason that you did not find that the particular trips had been charged in a particular category as such, upon the records of the corporation? A. Correct.

Q. And this does not, your examination did not attempt to determine whether those trips had, in fact, been made or not? A. No.

Q. You did find that during the period of the strike there [1538] was a cost of oil and gasoline and similar items? A. Yes, sir.

Q. Which would indicate that there was some automotive equipment being operated?

A. Yes.

Q. Will you next refer, Mr. King, to Item No. 4, under "Director of Labor Relations Costs" and refer to the amended bill of particulars, and I will ask you if it is a fact that the difference between the figure which you determined by your review and that

(Testimony of George E. King.)

as indicated by the bill of particulars, is the amount of Mr. Lee Knack's salary allocable to the work that he did in connection with the settlement of the strike? A. Yes, sir.

The Court: Let's see, now, this is Item——

Mr. DeGarmo: Item 4.

The Court: Four, yes.

Q. (By Mr. DeGarmo): And what was the amount of that salary which you eliminated?

A. \$756.23, which appears on Exhibit A of the amended bill of particulars.

Q. Well, now, Mr. King, isn't it a fact that that salary was either chargeable as a direct cost to this project or else it is chargeable as a part of administrative expense? [1539] A. Yes, sir.

Q. It would have to be in one category or the other? A. One or the other, yes, sir.

Q. Well, now, while we are on that subject of "Administrative Expense," I want to skip to Item 12, which appears on page eight of Plaintiff's Exhibit 56, and am I correct in my understanding of your testimony that you eliminated general administrative expense entirely from your approval upon the ground that there was no direct charge of general administrative expense to this particular project?

A. It was eliminated on the basis that the amended bill of particulars did not itemize those amounts. It's eliminated on the basis of the theory presented in the bill of particulars in computing that amount.

Q. Well, you did find, though, didn't you, Mr.

(Testimony of George E. King.)

King, that there was a general administrative expense charged to this project?

A. As I have stated in the report, we made no attempt to determine those amounts or to determine if there were such amounts.

Q. You did not even look to see if there was a charge for general administrative expense?

A. I can say that I recall seeing them, but I paid no particular attention to them, though. [1540]

Q. But you know that there were some there?

A. Yes.

Q. But you just paid no attention to them?

A. Right.

Q. Well, now, you recognize, do you, Mr. King, as an accountant, that there was general administrative expense in connection with this project?

A. Yes, sir, there would be.

Q. You don't have any question about that in your mind? A. No.

Q. Well, now, will you explain to me, Mr. King, just how you as an accountant would go about allocating and charging to this particular project, itemized, as you say you were looking for it, the general administrative expense of the Boise office and the district office of Morrison-Knudsen Company?

A. It's a lot of theory.

Q. I am very interested in your theory.

Mr. Carey: Well, let him answer.

A. The actual administrative expense that would be incurred on the job during this period, the administrative and overhead and fixed charges, other

(Testimony of George E. King.)

than administration that would be incurred on the job.

Q. (By Mr. DeGarmo): Well, how would you itemize them as you say you were looking for them?

A. The actual expenses that were incurred during this period.

Q. All right, we have a president of the corporation and we have about seven vice-presidents, and we have a secretary, and we have a comptroller, and we have engineers, a chief engineer and a number of other engineers in the district office, we have a district manager, a vice-president, an office manager; how would you go about allocating the salaries of those people to this particular job on an itemized basis?

A. Well, probably it would be impossible on an itemized basis unless there was some method or theory from the Boise office in which they made those charge-backs to their contract.

Q. Well, now, as a matter of fact you sat here and listened to the testimony in this case and learned that there was a method of allocating, did you not?

A. I may have missed that.

Q. Well, didn't you hear testimony concerning a 3% of anticipated revenue for general administrative expense?

A. I don't recall hearing that, no.

Q. Well, when you saw these charges for general administrative expense upon the company's records, and knowing that there was a general administrative expense item which you had been charged to investi-

(Testimony of George E. King.)

gate, didn't you [1542] look at that to determine what basis, the general basis, the general administrative expense had been charged to this job?

A. I do recall administrative expenses being charged to the job from Boise. I don't know whether I made a note of it at the time or not.

The Court: Is this one item the \$756, Lee E. Knack's?

Mr. DeGarmo: No, this is the Item 12 of \$19,257. Mr. Knack's salary is included in that item someplace.

The Court: Well, what I thought I had here is that I thought we were talking about Item 4. Did you place that item under general administration, then. You are practically together on the rest of this Item 4 up to two cents?

Mr. DeGarmo: We are together on Item 4, but I skipped to Item 12.

The Court: Oh, I see. You are talking about Item 12, then?

Mr. DeGarmo: I am talking about the general administrative expense, Item 12, which appears on page eight of this report and which Mr. King eliminated entirely.

The Court: Yes, I know.

Q. (By Mr. DeGarmo: You were looking to see if you had some references? [1543])

A. I have made no notes in my work papers of the charges.

Q. Well, Mr. King, as a matter of fact now, as

(Testimony of George E. King.)

an accountant, isn't it true that where you have a branch office or a district on a various project type of organization in a corporation, the only method of allocating, the only practical method and only method sound from an accounting standpoint of allocating administrative general expense, is upon some percentage basis, either of dollar volume, or some such arrangement?

A. It would be one method of making an allocation of administrative overhead, yes.

Q. Well, do you know of any other way where you cannot determine what particular dollar volume of a president's salary, and the other salaries, and the other general expense, is allocable to a particular project?

A. The form of allocating any administrative expense can be based on several factors, one would be the volume of business.

Q. Yes, that is one I suggested.

A. One would be the payroll distribution within an area; another could be fixed charges; and also I have seen just arbitrary splits.

Q. Pardon me?

A. Just arbitrary distribution of income to branches on the basis of the number of branches or the number of [1544] contracts going at one time.

Q. But, under no circumstances in that type of operation can you say, "President's salary, so many dollars; vice-president, so many dollars; and so forth?"

A. No, sir.

Q. You have to take your general administrative

(Testimony of George E. King.)

expense as a total expense and then allocate it upon some formula? A. Yes, sir.

Q. But in this case, because you didn't find that, what did you decide to throw it out entirely for, that is what I am trying to understand, this itemization that you spoke of; what type of itemization were you looking for?

A. The charges coming out of the Boise office.

Q. Well, you have already said you did see some general administrative expense charge there?

A. During this period.

Q. Well, what item is that?

A. This item is eliminated on the basis of the computation made. We made no attempt to determine what was the administrative expenses, we are taking exception to the methods you have used in computing it.

Q. You just take exception to the method but you don't suggest any other way? [1545]

A. That is right.

Q. In Item 5, Mr. King, in your determination of \$389.16, do you have your work sheet there that tells how you arrived at that by months?

A. Yes, sir.

Q. Can you tell what amount you allocated or established as the charge for March?

A. Which would be the April 1st billing, 1956? Total bill was \$194.82. The toll calls appearing on that bill totaled \$182.99, which were all dated prior to the strike. The rental of \$11.83, the balance of the amount was the rent for the month of April and

(Testimony of George E. King.)

considered as an amount during the strike. The May 1st bill totaled \$237.92. The base rent for May of \$11.83 was considered as an expense during the strike. Toll calls were from March 12 to April 24, totaling \$226.09. \$53.35 of those calls were prior to the strike, \$172.74 were during the strike. June 1st billing totaled \$120.62. The \$11.83 base rate was split fifty-fifty, one-half before the strike, one-half following the strike, \$5.92. The toll charges ran from April 24 to May 14 for all during the period of the strike, the June 1st.

Q. In what amount? A. \$108.79. [1546]

Q. \$108—— A. \$108.79.

Q. Thank you.

A. The July 1st billing totaled \$226.55, being the base rent of \$11.83 after the strike for the month of July toll charges from May 15 to June 14, totaling \$214.72, of which \$138.77 was after the strike. \$75.95 was before the strike, and a charge of \$12.50 made in June, 1956, for instrument rentals and toll calls of \$20.24, or a total of \$32.74, of which \$2.10 of the June rental was during the strike, the balance of \$30.64 being after the strike.

Q. Thank you. Now, is that last item that you gave, Plaintiff's Exhibit 44, was it taken off of 44?

A. Yes.

Q. I want to refer next, Mr. King, to your Item No. 8 which appears on pages five and six of Plaintiff's Exhibit 56. Did you reach a determination, Mr. King, that the rentals which were, as you say, established by the Boise office and which you used

(Testimony of George E. King.)

in setting up your determination figure, represented the actual cost or depreciated cost of the equipment in question?

A. There was no such information to make such determination available.

Q. In other words, you do not know at this time and you did [1547] not know then whether those figures were costs or whether they were something else? A. No, sir.

Q. You just took the figure because it was issued in a part of the manual as the M-K rental charge to a project?

A. The amounts I computed were actual billings to the job on their monthly rental schedule.

Q. Well, did you project those toward a period?

A. Yes, sir.

Q. Now, these billings, these amounts were not billed during the strike period, were they?

A. No, sir.

Q. So, you took the billings before the strike?

A. Right.

Q. And projected those over the strike period, isn't that correct? A. Yes, sir.

Q. Now, if there was any equipment which had not been billed and which was received during the strike period that would not appear in your computation?

A. I took the items that were presented in the bill of particulars, specifically.

Q. Well, did you find that all items in the bill of particulars had been billed?

(Testimony of George E. King.)

A. Yes, sir. [1548]

Q. To the project?

A. Yes; we identified them all.

Q. Had been billed to the project prior to March 31?

A. Prior or during the strike, yes, sir. We found the billing on all of them.

Q. You found the billing on all of them? Now, if you were considering this as a company operation rather than a contract operation, Mr. King, on your theory would you not have to first determine whether those rental charges represented costs, or something other than costs? A. Yes, sir.

Q. But you did not do that?

A. Such information was not available for me to do such.

Q. Well, then, isn't it a fact that as far as this item is concerned you were purely taking a contract viewpoint rather than a Morrison-Knudsen Company viewpoint, considering it as an operation rather than as a contract?

A. Considering it as a contract cost, yes.

Q. And if it did not represent actual cost, then, to that extent, your determination would be in error, would it not, from the company's standpoint?

A. Yes, sir.

Q. As I understand it, Mr. King, on the so-called minor items of equipment where it had been charged to the job [1549] at ten dollars, you used the ten dollar figure and had you considered that as the total cost?

(Testimony of George E. King.)

A. Only from the standpoint that if that had been expense in the contract, that would have been the total cost, the maximum cost, that the contractor would have sustained on that equipment.

Q. Well, again I want to ask you if you were viewing this as a contract item or as a Morrison-Knudsen Company item?

A. As a contract cost.

Q. Well, but was that necessarily the cost to Morrison-Knudsen Company of that item?

A. No, sir.

Q. And you did not attempt to make any determination whether it was or was not, did you?

A. Again, there was no way of making such a determination.

Q. So that if the cost to Morrison-Knudsen Company was not ten dollars but some other figure, that would affect your computation, would it not?

A. On the basis of minor equipment?

Q. Yes, sir.

A. I don't believe so, from the standpoint that the costs of any minor equipment would have been absorbed by other contracts. In other words, it would be immaterial whether it was in this contract or other contracts [1550] of Morrison-Knudsen.

Q. Well, again, do I understand from your viewpoint as an accountant, Mr. King, that if all of the minor items of equipment had been completely depreciated on the company's records, that it had no use value to this plaintiff?

A. No, sir; I am not saying that.

(Testimony of George E. King.)

Q. You do recognize that material capable of use has a use value, do you not?

A. Very definitely.

Q. But you do not recognize from an accounting standpoint it can be considered in determining cost?

A. Under the method that was being used in this contract.

Q. Yes, and because some other project had paid for that equipment and it was charged to this particular project at ten dollars, you considered that it had no cost but ten dollars as far as this project was concerned?

A. There would be no information available to me to determine what the cost of that minor equipment was.

Q. Yes; you did find in the case of minor equipment that they had purchased new \$631.95 of equipment?

A. Yes, sir.

Q. Is that correct? And you also found that there were sufficient charges on the books at ten dollars each to total \$220? [1551]

A. Yes, sir.

Q. So that as far as your audit showed, the total expense that Morrison-Knudsen Company had as far as this project was concerned for all of the items of minor equipment listed on Exhibit 29 was \$831.95?

A. That is right.

Q. Well, now, you knew as a matter of fact, just from general knowledge that that was not true, didn't you, that that material had cost much more than that?

A. Not from general knowledge. There was noth-

(Testimony of George E. King.)

ing available to me that would prove that it had cost more than that.

Q. Let me ask you, have you ever had any experience in construction accounting before?

A. Yes, sir.

Q. Have you ever worked on a construction project?

A. From the standpoint of auditing it.

Q. Do you have any idea of what construction equipment costs? A. Yes.

Mr. Etter: I don't think that these questions are material that he is going into now, "Have you any idea what construction equipment costs," I don't see that is material here.

Mr. DeGarmo: It's quite material.

The Court: Well, I will overrule the [1552] objection.

Q. (By Mr. DeGarmo): Mr. King, I do not understand as of now your treatment of the owned concrete forms. What is the difference between your computation and that as used by the company. You came out with \$2,317.50 and the company had \$2,781.

A. I believe it's based on footage.

Q. Well, is that one of the items that was corrected in this elimination? A. Yes, sir.

Q. That plus the rented concrete forms and the scaffold was correct then, was it not?

A. Yes, sir.

Q. So that there is no disagreement between us now on those three items? A. No.

The Court: Let's see, that is 8-A?

(Testimony of George E. King.)

Mr. DeGarmo: Yes; that was the amendment on the second page of Exhibit 29 that eliminated the question concerning those three items.

The Court: Oh.

Q. (By Mr. DeGarmo): You have already testified that the difference between your computation and that of the plaintiff with respect to interest on investment was caused by two factors: In the first place, you used the 76 instead of a 98-day method, is that correct? [1553] A. Yes, sir.

Q. And, in the second place, you selected a longer or a different period of time for the purpose of determining average investment?

A. Yes, sir.

Q. You are of the opinion, as I understand it, that your selection of months is a better selection than that of the plaintiff?

A. From the standpoint that it actually covers the strike period. My computation began on March 31; the invested capital, March 31, at the Boise office. The computation in the amended bill of particulars starts on April 30.

Q. Yes, as I understand it, you are not able to tell us at this time if you extended your method to the 98 days what the difference would be?

A. No, sir, I haven't made that computation.

Q. Now, let us turn for a moment, Mr. King, to the question of profits or mark-up. Do I understand that it is your theory if a contract is losing money, that then it should have no profit on anything it does because it is already losing, is that your theory?

(Testimony of George E. King.)

A. I don't follow you there.

Q. Well, let's assume that the contract is a losing contract and the contractor undertakes to perform \$100,000 worth of extra work, is it your theory that he should [1554] perform that for nothing because he is already losing money, and therefore there is no profit in the contract anyway?

A. It would depend on the basis of the contract. If it were a flat bid contract and he was going to have a set or specified profit.

Q. Well, you stated, I believe, that your theory was that if you recovered cost, that then you were all through, that is all that anyone is entitled to in a breach of contract case, is cost?

A. In this instance, yes.

Q. Well, why in this instance?

A. This was a bid price. The profit is not affected on this contract by a percentage computation if all costs or excess costs would be returned to the Morrison-Knudsen Company.

Q. All right, I want to ask you this, Mr. King: If you have a million dollars worth of equipment and supervisory personnel that is forced to sit idle for 76 days when there is other work which that million dollars worth of equipment and that supervisory personnel could be performing, is it your theory that there is no damage to a party if he is forced to sit idle for 30 days or 60 days or 90 days?

A. No, sir, there would be damage. [1555]

Q. There would be damage, wouldn't there? Well, now, is that damage just the cost at that time

(Testimony of George E. King.)

or is the possibility that he might make a profit on that million dollars worth of equipment worthy of some consideration?

A. It would depend on the basis of what his method of making a profit was.

Mr. Etter: Well, just a minute, I will object. Is your question, counsel, he could be making a profit on some other job, is that what you are asking Mr. King?

Mr. DeGarmo: I certainly want to know what his theory is.

Mr. Etter: Loss of profit on another job other than this one, that is what you are asking him?

Mr. DeGarmo: I am asking him if it is his theory that cost is all that anybody is entitled to if you are on a job that is losing money, if that is your theory?

Mr. Carey: Well, he objected not long ago because he said that very same kind of question was a question of law and not a question of accounting.

Mr. DeGarmo: Well, the Court overruled my objection, I am just pursuing it now.

The Court: All right, go ahead.

A. Only in this case do I take that viewpoint from the standpoint of that it was a set price.

Q. (By Mr. DeGarmo): Well, at the time that you were out [1556] there you have told your counsel, or counsel for the defendants here, that this contract under no circumstances could have made a profit, is that correct?

(Testimony of George E. King.)

A. As the facts and figures of the accounting records show, no.

Q. Well, were you advised of this claim which was in issue at the time? A. No, sir.

Q. You did not know of that at the time?

A. No.

Q. Do you recognize that, Mr. King, in attempting to prove damages in a case of this kind that it is not always possible to prove with mathematical certainty all damages that a party has incurred by reason of a situation?

Mr. Carey: That, also, is a question of law and the burden is on the plaintiff, and must be, any question should be resolved against the plaintiff.

The Court: Well, I will sustain the objection on that. I think it's probably a question of law.

Q. (By Mr. DeGarmo): Did you approach this examination from the standpoint that you were told to find only cost and nothing more?

A. Yes, sir.

Q. Now, who told you to do that?

A. The costs that were sustained in conjunction with the [1557] items claimed.

Q. Well, who told you that?

A. Mr. Etter, counsel for the Engineers.

Q. Well, then, as far as you were concerned there was no reason to audit the question of loss of profits at all because you already had been told to not consider it, isn't that true?

A. No, I don't believe so.

(Testimony of George E. King.)

Q. Well, if you were told that cost was all you were to look for, lost profits is not a cost, is it?

A. No, it is not.

Q. Well, then, were you correct in telling me that what you went out there looking for was costs and nothing more, and that you were told to look for nothing more?

A. That was the basis of my examination.

Mr. Etter: I will answer that question, if you want me to, Mr. DeGarmo, if there is any question in the Court's mind of any theory.

Mr. DeGarmo: I don't think anybody asked you for an answer.

Mr. Etter: Well, you are asking what I said to him, why don't you ask me?

Mr. DeGarmo: I am asking the witness. If you want to be sworn, I will examine you.

Mr. Etter: Why, certainly, I will be glad [1558] to answer anything that you have to inquire of me.

Q. (By Mr. DeGarmo): Let's take the next item, Mr. King, your Item 16. Well, first, before we leave 11, since this enters into some of your other testimony, I want to just question you for a moment about the computation that you have made here with interest. Is it true that according to your mathematical calculation based upon your average daily revenue that you concluded as shown on page eight of this Plaintiff's Exhibit 56, that although the strike actually existed in status quo for 76 days, that the loss in time was only 58?

A. At October 1st, 1956, that was the delay at

(Testimony of George E. King.)

that point. That would be attributable to a strike or other delaying factors.

Q. Well, now, Mr. King, could I have Plaintiff's Exhibit 23, please? You know, as a matter of fact, do you not, that income is not received on an average daily basis on this type of contract?

A. That is right.

Q. You do recognize that absolutely, do you not?

A. Yes.

Q. And you also know if you examine either of the charts, 21, 22 or 24, that that conclusively shows that income is not received on an average daily basis, do you not? A. Yes.

Q. So, when you assume an average daily basis you are [1559] assuming something that is contrary to fact, isn't that true?

A. I don't believe I follow you there.

Q. In other words, if you assume for the purpose of computation, an average daily revenue, you are assuming something that is contrary to the fact of this particular project?

A. Only it is not an assumption on my part from the standpoint that it was based on the actual figures in the records of the accounting.

Q. Yes, but you know, as a matter of fact, that income was not received on any average daily basis, don't you?

A. I am not saying that income was received on any average daily basis, I am computing the average daily basis that it was projected on and actually received on.

(Testimony of George E. King.)

Q. Yes, but it was not received on an average daily basis, was it, it was received on an actual basis of progress which was not average at all, that is correct, isn't it? A. That is right.

Q. So that in the month of March, for instance, the revenue was \$120,487 here, just follow this exhibit, the revenue was \$120,487, and in December the revenue was \$14,610. Now, if you averaged those two, that would not be the way the revenue would come in, would it, per day? [1560]

A. At that point it would be an average that the revenue had been received.

Q. Had been received, but progress is dependent upon, or revenue is dependent upon progress, is it not? A. Yes.

Q. And the amount of progress each day determines upon the revenue that is payable at the end of that day, does it not? A. Yes.

Q. And if you perform ten times more work on one day than you do on another, you do not receive the same compensation for both days, do you?

A. No, sir.

Q. And in this case that was the way that the revenue was received, was it not, was in accordance with the actual progress of the work?

A. Percentage of progress completed, yes.

Q. Yes, and that percentage of progress was not the same each day, was it?

A. It was not computed on a daily basis.

Q. Well, the revenue was not the same because the progress was not the same, was it?

(Testimony of George E. King.)

A. Probably not.

Q. Well, you know it was not, don't you?

A. You can't have a revenue production per day, that isn't [1561] any computation that was made per day.

Q. Let me ask you this: You know that the revenue was not even average per month, let alone per day, isn't that true, and doesn't the exhibit in front of you tell you that?

A. You mean from the standpoint of the billing that was made to the AEC was not on an average per day?

Q. Yes, sir.

A. No, sir, it was not on an average per day.

Q. And it was not on an average per month. was it? A. No.

Q. It was on the actual progress of work to that day, or to the end of the month?

A. To completion.

The Court: Were progress payments made monthly? I assume they were.

Mr. DeGarmo: Yes, sir.

Q. So that when you use an average daily revenue you are entirely disregarding progress, are you not?

A. No, sir, that wasn't average daily revenue that would represent progress on the daily basis.

Q. At the end of that period, would it not?

A. Yes.

Q. Well, now, wait a minute. Let's go back: You say that the average would represent it at the end of that time, [1562] that isn't true, is it?

(Testimony of George E. King.)

A. I believe so.

Q. Well, now, isn't it a matter of fact that the total revenue as of a particular day is dependent upon the amount of work that has been done up to that day, isn't that true; I thought we had gone over this.

A. Yes, we are talking about two different things, I believe.

Q. Yes, you are talking about revenue as distinguished from production, aren't you?

A. Yes.

Q. But production is dependent, or revenue is dependent solely upon production in this type of contract? A. Correct.

Q. So that you do not receive the same revenue for every day at work?

A. No, sir. In other words, you haven't the same average for every day, which the chart shows.

Q. But you used it as an average figure, did you not, for your determination?

A. Based upon your own projections, yes, as being an average at that point per day revenue earned.

Q. I want you to tell me, to work this out for me; take the period of March 22, 1956, and work out the figures for me now and tell me how you arrived at 44 days behind [1563] schedule at that date?

The Court: What was this date, Mr. DeGarmo?

Mr. DeGarmo: March 22, the date the strike started. He, in accordance with his report, says that

(Testimony of George E. King.)

the job was behind actual scheduled progress 44 days at that time.

A. At the end of March.

Q. (By Mr. DeGarmo): No, I want March 22.

A. I have no computations that would show as of March 22,

Q. Well, why didn't you use March 22?

A. My computations were made on the basis of the projected revenue as compared to your charts that you had projected in the delays of the time.

Q. Well, our charts were prepared on the basis of March 22, were they not, not March 31?

A. March 22, yes.

Q. There was no work performed between March 22 and March 31, was there, Mr. King?

A. I believe there was.

Q. What?

A. I was told that they were pouring at that time and that there was certain other work going on. Now, this is hearsay.

Q. Yes, that this company was pouring concrete with cement finishers and with cement masons?

Mr. Etter: I will object, I don't think we have to [1564] have a speech. If he is wrong, why doesn't he tell him? He said it was hearsay, why does counsel have to make a speech about it?

Mr. DeGarmo: I am sorry, Mr. Etter, if I made a speech I didn't intend to.

Mr. Carey: That was an inch of speech.

The Court: Well, go ahead.

Q. (By Mr. DeGarmo): I am asking why you

(Testimony of George E. King.)

didn't use the March 22 date, which was the date of the strike and which the chart which you have in front of you, Plaintiff's Exhibit 24, states that the behind schedule progress on March 22 was 18 days?

A. Because of the fact the basis of our projection here is on your monthly scheduled revenue, which is on a monthly projection. The revenue received is on a monthly basis of revenue received.

Q. Well, Mr. King, if in that last ten days of the month you received 90% of the revenue for that month or you performed the work which resulted in 90% of the revenue for that month, your calculation would be completely off, would it not?

A. No, sir, I don't believe so.

Q. Well, now, if progress is directly related to income and you performed 90% of the work for the month in the last ten days and you used the month end figure only [1565] as an average, your computation would be off as of March 22, wouldn't it?

A. If I understand you, you are saying the 90% of the completion would be done?

Q. In the last ten days, yes.

A. Oh, on that basis, yes.

Q. It would be off, yes. A. Yes.

Q. Well, now, you have disregarded, then, the interim period of March 22 in making your computation and you took a period ten days later, did you not, isn't that true, that you used March 31?

A. Yes, in computing the computation.

Q. I want to refer next, Mr. King, to Item No. 16. If I understood your testimony, one of the prin-

(Testimony of George E. King.)

principal differences that you have with the plaintiff on Item 16 is that you say it disregarded the cost of overage pour in its computation, is that correct?

A. Yes, sir.

Q. How did you determine, Mr. King, that there was an excess cost of pouring the additional yardage? A. I don't follow you on your question.

Q. I am asking how you arrived at the definite accounting conclusion that there was a cost of pouring the additional quantity of concrete. Now, you have said that [1566] from your standpoint we have to have facts and figures to support anything, from an accounting standpoint. I am asking you, as an accountant, how you arrived at the conclusion from the figures that there was a cost of any kind in connection with the excess quantity of concrete?

A. By basing the actual pour to the estimates, original estimates, arriving at a percentage of the excess pour and applying that over an equal basis throughout the life or throughout the continuation of the pour.

Q. Well, now, aren't you indulging as an accountant in certain assumptions there, Mr. King?

A. Yes, sir.

Q. Not based on facts or figures?

A. The computation is based on facts and figures, the application.

Q. The mathematical calculation, yes, but the reason for the calculating is neither based on fact or figure in the company's records.

(Testimony of George E. King.)

A. The basic facts are direct from company records.

Q. The total costs, yes.

A. The total costs, yes, and total concrete pours.

Q. And total concrete pours, but whether there was any excess costs in connection with the pouring of that additional quantity you are merely assuming, are you [1567] not? A. Yes, sir.

Q. Now, if, as testified by one of the witnesses here yesterday, I believe, in the transportation of this concrete from a point approximately ten miles distant to the site of the work itself, there occurred a shrinkage in a considerable amount in the quantity of cement, the yardage of which was determined at the point of discharge into the truck, would there necessarily be an additional cost in connection with the pouring of that concrete?

A. I again don't quite see what you are asking.

Q. Well, let's say that the yardage itself is determined at the point of discharge into the conveyor truck which takes it to the point of discharge into the site of the work, and that in that transportation a shrinkage occurs through settlement of the cement and the elimination of air bubbles, and so forth, so that when you get to the site of the work instead of pouring a 25 yards of concrete you only pour 24 yards into the forms, and by reason of that you increase the number of yards which you buy, not what you pour, but that you buy; is there necessarily an increase in the cost of the pour itself?

A. Just offhand I would say probably not.

(Testimony of George E. King.)

Q. And if you are pouring concrete in a building, the size of [1568] which does not change, it's the same building and you just have to put more mortar in between the forms and pay for more mortar, but you put the same number of ultimate yards at the site of the work, there would be no increase in costs, would there, other than the cost of the concrete itself?

A. Well, not necessarily, the additional pour would result in increased costs because of cost elements that would be required there to make up for that additional pour.

Q. Well, what in particular now, other than the cost of the concrete, would you say there would be there?

A. Your labor costs of pouring that concrete.

Q. Well, you are pouring only the same amount of concrete that you originally contracted to pour, except you are paying for a larger amount?

A. But it is also costing more to pour that, from the standpoint of time element.

Q. Well, why, Mr. King, when you are pouring at the site of the work the same quantity that you originally contracted to pour, you only pay more for the concrete because at the site where you get it it is a larger yardage, where is your increased cost that you are talking about?

A. It would be in your labor costs of pouring that.

Q. Well, all right. [1569]

A. Let me explain what I mean. If in your ex-

(Testimony of George E. King.)

ample there, you have a shrinkage, say, from a 25 yard load to a 20 yard load, all right, every fifth trip you would have to make a sixth trip. You would have the labor for that sixth trip.

Q. Aren't you assuming that the contractor is paying for the cost of hauling?

A. No, you have men there that are making that pour. I am not assuming anything as to what expenses occur, maybe he is not incurring any if he is doing his own hauling. In other words, with an increased pouring you would have increased costs, I don't see how you would get away from it.

Q. Have you ever poured concrete on a job of this kind? A. No, sir.

Q. You wouldn't know, then, that the truck haul is continuous into a hopper and that the men taking it away from the hopper are the same men all the time? A. From actual experience, no.

Q. All right. Now, Mr. King, in your computation you have assumed the same cost of pouring every additional yard of concrete purchased or concrete poured, no, of concrete purchased that was paid for the estimated, or that was computed for the estimated quantity, have you not? In other words, if the estimated quantity was 1200 and [1570] there was purchased 1250, which shows as poured, you have computed each yard of that at the same average cost? A. Yes.

Q. And, then, have set over a portion of that average cost as against the excess pour?

A. Yes.

(Testimony of George E. King.)

Q. So that it is bearing the same cost uniformly or every yard is bearing the same uniform cost, let's put it that way.

A. On a monthly basis.

Q. Yes, then Mr. King, if a portion of this concrete is merely used for fill, would that affect the average cost that you are using here?

A. I don't know that I could answer that.

Q. Well, you recognize, do you not, Mr. King, that in connection with labor costs the forming labor cost is a part of the concrete pour, do you not?

A. Yes, sir.

Q. And if you don't build any forms, that would seriously reduce your labor costs, would it not?

A. Correct.

Q. You did not take into account either of those factors in your determination, did you?

A. No. [1571]

* * *

L. GORDON LEE

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Etter:

Q. Will you state your name, please?

A. L. Gordon Lee.

Q. Where do you reside, Mr. Lee?

A. In Spokane.

Q. And what is your occupation or profession?

(Testimony of L. Gordon Lee.)

A. Certified public accountant.

Q. And how long have you been a certified public accountant? A. Since 1946; 1943, pardon me.

Q. 1943? How long have you been engaged in accounting work? A. Since 1929.

Q. Since 1929? And what was your training, Mr. Lee?

A. Business college and my own study on the side.

Q. And are you associated with the firm of Morris and Lee? A. Yes. [1574]

Q. Lee and Company? A. Yes.

Q. And what is your status, are you one of the partners? A. A partner.

Q. And did you work in the review and the compilation of the audit report indicated as Exhibit 56, in conjunction with Mr. King?

A. Yes, conferred with him.

Q. And did you review that audit report?

A. Yes.

Q. And your name is signed, is it not, as one of the partners, Morris, Lee and Company?

A. Yes.

Q. Now, I want to ask you just with respect to one item, if I may, Mr. Lee, loss of profits, Item 11, contained as \$64,190 in the amended bill of particulars, now reduced to \$16,592. Have I discussed that matter with you, a determination of that matter?

A. Yes.

Q. And, likewise, has Mr. King, with respect to

(Testimony of L. Gordon Lee.)

his analysis and the adjustment he made that he felt none of that was allowable? A. Yes.

Q. I see. Now, in your discussion and review, do you find or would you allow any loss of profit on this type of [1575] contract? A. No.

Mr. DeGarmo: That, I certainly think, is objectionable.

Q. (By Mr. Etter): Did you find any loss of profit now?

Mr. DeGarmo: Just a minute. I ask that the answer to that question be stricken and that the answer is objectionable on the ground that it asks for a ruling by this witness on a legal question.

The Court: I think I would allow it on the same basis I did with the other witness, that is, in his expert opinion as an accountant, if it should not be allowed.

Mr. Etter: That is right.

The Court: That is what you had in mind?

A. Yes.

The Court: Well, I will let it stand on that basis.

Q. (By Mr. Etter): All right. And will you explain why not, in your opinion?

A. In my opinion, in this type of contract it's a fixed bid and the recovering of the items claimed in the bill of particulars would put the company in the same position as though a strike had not occurred, and you can't compare this type of operation to a merchandise business, for example, where you would terminate the sales [1576] that would

(Testimony of L. Gordon Lee.)

occur during a strike period. So, the profit would be exactly the same when they had recovered their costs as though no strike had occurred, the profits would be the same, or loss.

Q. You are assuming this was a fixed bid of a million eight hundred and some odd thousand dollars? A. Yes.

Q. And you heard the testimony that there is included direct cost 15% overhead on direct cost, plus 10% profit? A. Yes.

Q. And that is the fixed amount that you are talking about, is that correct? A. Yes.

Q. And that any excess over and above that amount would be cost, is that right? A. Yes.

Q. And is it your conclusion or is it your opinion that the profit already inheres in that type of a contract? A. Yes, that is correct.

Mr. DeGarmo: I wish you would let the witness answer.

The Court: Well, that is leading.

Mr. Etter: I don't think I am as good an accountant as he is, you can cross-examine.

The Court: Are you through? [1577]

Mr. Etter: Yes.

The Court: Yes, all right.

(Testimony of L. Gordon Lee.)

Cross-Examination

By Mr. DeGarmo:

Q. Mr. Lee, if you had a million dollars worth of equipment out here on a project and you were the owner of that equipment and a strike occurred and that equipment was forced to sit idle for an indefinite period of time, say 76 days, would you feel that you were made whole if you got back just the direct cost?

A. Would you explain what you mean by "direct cost"?

Q. Well, you explain what you mean by it and I will use your definition.

A. All right, the direct cost of this contract would be the labor and the materials and overhead.

The Court: I assume your question would also ask the witness to assume that this equipment was on a job where there was a fixed lump sum bid on the contract?

Mr. DeGarmo: Yes, whether there was a profit in the job or not is immaterial in my question. I am asking——

Q. I am asking you if you had, let's assume that the equipment is on a loss job and it is forced to sit idle for 76 days and you have your money and your personnel tied up for that period of time, would you consider [1578] you as owner of that equipment and you as the contractor, would you consider that if you got back just the interest on

(Testimony of L. Gordon Lee.)

your investment and the direct costs under your definition for that period of time, that you were in just as good a position as though the strike had never occurred?

A. That is the type of a question, Mr. DeGarmo, that you can't answer with a yes or no.

Q. Well, that is the type of question that counsel asked you.

A. He didn't mention equipment or the illustration that you have used.

Q. Well, I am asking you, let's assume, I am assuming a loss contract, one on which there is a known and definite loss at the time, and you are forced to sit idle for a period of 76 days with a million dollars worth of equipment tied up out there and your supervisory personnel tied up, and I am asking you if you would consider that you had been made whole if you got back just the actual direct cost, under your definition?

A. There is one point in your question, you have mentioned personnel; of course, the personnel would be part of the overhead cost.

Q. Well, you are giving us back the money that we pay them in salary. [1579]

A. Right.

Q. That is part of direct cost under your definition?

A. That is right.

Q. Now, do you consider that that is all that you are going to be entitled to and all that you would want, as the owner of that property?

A. It depends on whether the equipment could be used at another location, for one thing.

(Testimony of L. Gordon Lee.)

Q. Well, let's assume this is in the construction season in March, April and May in this country.

A. You mean, to continue that comment with your question as to the use of that equipment?

Q. Yes, to consider it you said that you would like to know whether there was some other job for it.

A. Yes, from the accounting viewpoint I would say that the equipment that is lying idle on the job during the 76-day strike period, if it had not been considered in the original bid, would be an additional cost.

Q. Well, your original bid would contemplate that equipment being tied up only "X" number of days, wouldn't it, Mr. Lee?

A. Yes, I think so.

Q. It wouldn't have contemplated it being tied up "X" number of days plus 76?

A. Well, I couldn't answer that because I wouldn't know [1580] what the bid would contemplate.

Q. Well, if the contract called for completion on a certain day, you would only contemplate your equipment being tied up to a completion date, would you not? A. Yes.

Q. Now, with that assumption, can you answer the question?

A. Yes, I think I have already answered it.

Q. What?

A. That if during the 76-day strike period, if this equipment had to lay idle on the job, that there

(Testimony of L. Gordon Lee.)

would be a cost incurred in that investment, obviously, if it isn't recovered in any other part of this bill of particulars.

Mr. DeGarmo: I have no further questions.

The Court: Any further questions?

Mr. Etter: None.

The Court: That is all, then.

(Witness excused.)

The Court: The court will adjourn until tomorrow morning at ten o'clock. Oh, let's see, is that your last witness?

Mr. Etter: That is right.

The Court: Do you have some rebuttal?

Mr. DeGarmo: Well, I may have one witness for a very few questions, I would say fifteen minutes. [1581]

The Court: Well, we will be ready to argue the case, then, tomorrow morning?

Mr. DeGarmo: Yes, sir.

The Court: Will an hour on a side be enough?

Mr. Etter: Maybe too long.

Mr. DeGarmo: It will be a great sufficiency for me.

The Court: Well, I would like to finish it before lunch time. I think you could do that, so we will start at ten o'clock and proceed with the argument, then.

Mr. DeGarmo: I think we can.

Defendants Rest

(Whereupon, court was adjourned until ten o'clock a.m. on February 27, 1958.) [1582]

Thursday, February 27, 1958—10:00 o'Clock A.M.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit:)

Rebuttal

The Court: For the record this morning I would like to say that in the case of Exhibit 56 a copy has been substituted to take the place of the original, which the Court inadvertently marked up in the course of the presentation of the testimony yesterday. This will be the original 56, now.

Before you start in, I might say here that you gentlemen have gone over these exhibits?

Mr. DeGarmo: I have a slight amount of re-direct.

The Court: Oh, yes, proceed then with the completion of your testimony.

Mr. DeGarmo: Yes. Mr. Goade, would you come forward, please?

ALFRED J. GOADE

recalled as a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

By Mr. DeGarmo:

Q. Mr. Goade, since court yesterday afternoon have you had occasion to become familiar with Plaintiff's Exhibit 33 in this case covering Item 16 (shows paper to witness)?

A. Yes, I have.

The Court: What was that exhibit number?

Mr. DeGarmo: 33, that is the Item 16 Exhibit.

The Court: Yes.

Q. (By Mr. DeGarmo): With reference to the first page of the exhibit, Mr. Goade, will you state what is the theory or basis for the computation which is there made?

A. It is based on the actual cost per yard of concrete.

Q. Will you state, Mr. Goade, what, if any, effect upon the figures as shown upon the first page of this Exhibit 33 there would be if a larger or smaller quantity of concrete was used than was originally estimated to have been used?

A. Well, I can see that there would be no effect on the unit cost.

Q. Why is that, Mr. Goade?

A. You would have a total cost for pouring the concrete and the total number of yards poured divided into that [1584] figure would give you a unit cost figure.

(Testimony of Alfred J. Goade.)

Q. Now, have you also, Mr. Goade, since yesterday evening when we left court, had occasion to examine Plaintiff's Exhibit 56 and, in particular, that portion of 56 which appears on pages eleven and twelve, dealing with the question of labor cost of concrete? (Shows document to witness.)

A. Yes, I have.

The Court: What page is that again?

Mr. DeGarmo: Eleven and twelve, your Honor.

The Court: All right, go ahead.

Q. (By Mr. DeGarmo): Will you tell us, Mr. Goade, whether the computation made there affects in any way the accuracy of the computation which is made on the first sheet of Plaintiff's Exhibit 33?

A. I don't believe I understand.

Q. I want to know whether the computation which Mr. King made here on pages eleven and twelve, with reference to the 100-F and 100-H areas, in your opinion, affects in any way the accuracy of the computation and the per cubic yard determination as made on Plaintiff's Exhibit 33, the first page?

A. Yes, it's a different computation. The mathematical computation is correct here, as we see it, but it does bring about a different cost per cubic yard. [1585]

Q. Well, which one of the computations is the accurate one, as far as the determination of cost?

A. I would say Plaintiff's Exhibit 33 is correct.

Q. Now, will you tell us why you say that Plaintiff's Exhibit 33 is correct and the mathematical

(Testimony of Alfred J. Goade.)

calculation which you say is correct mathematically, on Plaintiff's Exhibit 56, is an incorrect one?

A. On Plaintiff's Exhibit 33 the total cost of pouring concrete is divided by the cubic yards poured, which would give you an accurate cost per yard, on page 11 of this report.

Q. By "this you are referring to Plaintiff's 56?

A. Yes, they have taken what they call an excess yardage poured based on the engineers' estimate. Actually, the excess, if there was one, should not be considered in this computation because it has no meaning on the unit cost computation.

Q. Well, when they get all through with the mathematical computation which is made upon Plaintiff's Exhibit 56, on pages eleven and twelve, what is the result as far as this case is concerned, what bearing does it have, if any?

A. Exhibit 56 shows an excess cost per yard less than Exhibit 33.

Q. Yes, I know it does, but is that excess cost which they [1586] determined mathematically, one which affects this case as far as the excess cost of the yardage actually poured, other than merely the mathematical difference between the two exhibits? Perhaps you don't understand what I mean?

A. No, I am not sure that I do.

Q. Well, you said that in Plaintiff's Exhibit 56 that as far as the mechanics of the computation, that it is correct mathematically, but you say the fact that they considered excess concrete is of no consequence. Now, I want to know if you say that is

(Testimony of Alfred J. Goade.)

of no consequence, what effect, if any, does it have upon the accuracy of Plaintiff's Exhibit 33, the per yard determination there made?

A. Well, I don't believe that the computation that they made is sound, basically sound accounting-wise.

Q. And why is that?

A. Well, because they have used figures that were based, in the first place, on an engineers' estimate and not on actual cost.

Q. Now, let me ask you something further, Mr. Goade: In the determination of yardage for paying purposes, as distinguished from yardage of concrete purchased, is there something to be considered other than the actual cost of the concrete itself? [1587]

A. Yes, there is.

Q. What is that?

A. For pay purposes, at different periods during the job you would have forming costs that would go ahead of the actual pouring of the concrete.

Q. And is that paid for as a concrete item?

A. Yes, it is.

Mr. DeGarmo: You may examine.

Cross-Examination

By Mr. Etter:

Q. Mr. Goade, isn't it true, in any event, on your calculation on Exhibit 33, that whether you call them excess yards or otherwise, there was a greater number of yards considered than was originally in the engineer's estimate? A. Yes.

(Testimony of Alfred J. Goade.)

Q. Isn't that correct?

A. Yes, that is correct.

Q. And isn't it a fact that those yards that you found that are on Exhibit 33 were all billed, and were billed to the AEC for payment, each yard that appears in your exhibit was billed for payment as a cubic yard to the AEC? A. Yes. [1588]

Q. Well, at least the Exhibit indicates that many and you would assume they billed them for payment, isn't that right? A. Yes.

Q. In any event, so far as price is concerned and cost is concerned, there were additional cubic yards billed to the AEC than existed in the original engineers' estimate, isn't that right? A. Yes.

Q. Beg your pardon? A. Yes.

Mr. Etter: That is all.

Mr. DeGarmo: That is all, Mr. Goade.

(Witness excused.)

Mr. DeGarmo: Call Mr. Nelson.

RALPH NELSON

recalled as a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

By Mr. DeGarmo:

Q. Mr. Nelson, in connection with Mr. King's testimony, there was introduced in evidence yesterday Plaintiff's Exhibit 56. Did you have occasion yesterday evening to make an examination of this

(Testimony of Ralph Nelson.)

exhibit, pages eleven and twelve, as it related to the labor cost of concrete? [1589] A. Yes, sir.

Q. Now, I think you have already testified that you either assisted in or were responsible for the preparation of Plaintiff's Exhibit 33, is that correct? A. Yes, sir.

Q. Will you tell us what is the theory of the computation which Mr. King shows at pages eleven and twelve of Plaintiff's Exhibit 56?

A. In the first place, he has used the concrete that was actually delivered and paid for at that time. He gave no credit for forming that had been done ahead of the actual pouring as was computed, used to determine the method of payment.

Q. Well, his labor employed in the forming was ahead of pour?

A. Yes, sir, the labor cost is in the labor figure up to that date; therefore, you should also include it in the quantity.

Q. And by eliminating that factor he secures a lower or higher per cubic yard cost of the material before March 31?

A. He secures a higher cost at that time.

Q. For the material or for the labor prior to March 31, which tends to reduce the amount of the claim, does it not? A. Yes, sir, it does [1590]

Q. And eliminates from consideration the actual labor that was performed on forms at that time?

A. That is right.

Q. All right. Now, what else did you find with respect to this computation by Mr. King?

(Testimony of Ralph Nelson.)

A. Mr. King made a computation here based on excess pours.

Q. Did he use the same yardage figures that you used in Plaintiff's Exhibit 33, Mr. Nelson?

A. Yes, sir; he did, and then after that he used a percentage figure which he obtained by dividing the so-called excess yardage by the total yardage that had been paid for and arrived at a constant percentage figure which he then prorated over the concrete that had been purchased all through the job.

Q. What was his purpose or reason in arriving at that percentage?

A. I couldn't say. To me it makes no difference, you could do it one way or the other.

Q. All right, and after obtaining this percentage, then, he applied that, he took the engineers' estimate of concrete and took the difference between that and the actual yards of concrete and applied this percentage to that, did he not?

A. Yes, sir.

Q. And having arrived at that, at those figures, then, [1591] what did he do with them?

A. Well, in arriving at his average cost per yard up to the period of March 31, he went back and disregarded this calculation he had made. In other words, he went back to the original concrete figure.

Q. That is the estimate figure?

A. Yes; the estimate figure of concrete that had been delivered and paid for, to arrive at an average cost per yard which was higher than it would have been, that would have made a higher figure

(Testimony of Ralph Nelson.)

at that time rather than if he had used the reduced figure, reducing it by his so-called overage.

Q. All right, and what was the result of his failure to reduce both the figure before and after?

A. Well, it resulted in a higher average cost at March 31, a lesser cost from the period of June 6 until September 30, thereby resulting in a lesser excess cost per yard.

Q. Now, have you made a recomputation using his exact method but using the percentage figure as applied to both the before and after figure?

A. Yes, sir; I have.

Q. And when you did that what difference was there between that calculation and the one which you originally made on Plaintiff's Exhibit 33, as to labor?

A. There was no difference as to the total [1592] cost.

Q. You came out with the same total excess cost?

A. Yes, sir.

Q. One further thing, Mr. Nelson, in connection with the item of "Interest on Investment," Mr. King testified that instead of using the months which you used, he went back and used the month of March, I believe, of 1956, in order to secure an average of invested capital in this operation?

A. Yes, sir.

Mr. DeGarmo: Could I have No. 10, please? No, not No. 10, No. 14.

(Whereupon, the exhibit was handed to plaintiff's counsel.)

(Testimony of Ralph Nelson.)

Q. (By Mr. DeGarmo): On Plaintiff's Exhibit 48, Mr. Nelson, there are shown the month end figures for April, May, June and July. Could you give us just one more figure, for the record, and that is the March 31, 1956, figure?

A. The investment figure at March was \$147,-534.32.

Q. Now, using that figure have you made the computation to check to see whether you come out with the same figure as Mr. King's, if you use a 76-day basis instead of a 98-day basis?

A. Yes, sir.

Q. So that that is the figure that he used? [1593]

A. Yes, sir.

Mr. DeGarmo: That is all. You may examine.

Cross-Examination

By Mr. Etter:

Q. Mr. Nelson, so that we don't have to look for these exhibits and can move along, you remember that these were marked as Exhibits 21 and 22?

A. Yes, sir.

Q. Construction status chart? The testimony yesterday indicated when you brought your figures in that as to the 100-F area although at the end of March you had projected a completion of the concrete pour of 80%, about half of that amount had been poured, do you recall?

A. I didn't bring that figure in, but I believe that is true.

(Testimony of Ralph Nelson.)

Q. And with respect to the H area, at the end of March, I think it was, if I recall correctly, instead of 50 it was around 40, or about 10% short, do you remember? A. I don't remember.

Q. Well, it's somewhere around there. Now, with respect to particularly the F area, if 80% of the pour of concrete had been made at that time rather than 40% as existed before the strike, would your computation of [1594] loss of efficiency be the same as it is now?

A. I didn't base my computation on percentage, I based it on average cubic yards.

Q. Average costs? A. Average costs.

Q. Yes, but if all of that concrete had been poured and you were not some 40% behind at that time you would not have needed to pick that up in September, isn't that correct?

A. I don't quite get what you are driving at.

Q. Well, you had to eventually pour all that concrete, didn't you? A. Yes, sir.

Q. And your cost increased in September, didn't it? A. Yes, sir; it did.

Q. Well, then, you had an increase, then, on about 40% of this amount that should have been completed about March 31, under your estimate?

A. I still don't see where that applies to the estimate.

Q. Well, your computation as to excess cost goes to all the concrete that you poured that remained unpoured at the time of the strike, isn't that true?

Q. You would also have to apply it to that be-

(Testimony of Ralph Nelson.)

fore and that after; in other words, you can't say that it goes to one and not the other. [1595]

Q. Yes, but by reason of this failure of pour, you had running expenses for four months but you didn't have revenue coming in, did you?

A. Which four months are you talking about?

Q. Up until March 31.

A. We had revenue for January, February and March.

Q. Yes, but you were \$230,000 behind in your revenue, were you not?

A. I don't recall that figure in making my computation of this. I didn't use any revenue figures, I used average cost per yard.

Q. Well, there was testimony that revenue is based upon progress, isn't that true?

A. That is true.

Q. That is true? And this exhibit in here the other day, Exhibit 23, indicates that in March there was \$226,852 shortage in revenue coming to the project, that is, in this exhibit, so apparently there was a lack of progress, at least, as compared to revenue of almost a quarter of a million, isn't that right?

A. Yes; there would have been something affecting that.

Q. Isn't that right? So that you, in computing these figures, took the over-all figures of all the amounts of concrete and labor employed in the pouring in both areas, isn't that right? [1596]

A. I took the actual cost.

(Testimony of Ralph Nelson.)

Q. Of all of it? A. Of the concrete?

Q. Yes; labor and material.

A. Well, in one computation we used labor and in another one we used supplies.

Q. You used supplies? Now, as far as the progress of the work was concerned, though, there was a lack of progress to the tune, at least, of \$226,000, shortage in revenue in March, isn't that right?

A. Well, yes; apparently it would apply to all the work on the job, not necessarily to concrete.

Q. That is right. So your costs, as far as your computations are concerned, include, likewise, the lack of progress up until March 31, isn't that right?

A. Yes; my figure here reflects that. The cost is high up to that point on an average yard basis. However, we have not penalized this computation in any way. We take the difference between the costs for the two periods.

Mr. Etter: That is all.

Mr. DeGarmo: That is all, Mr. Nelson.

(Witness excused.)

Mr. DeGarmo: We have no further testimony.

Mr. Etter: We have none. [1597]

The Court: Are you ready to proceed with your argument?

Mr. DeGarmo: Yes.

The Court: I might say that it is perfectly obvious to counsel, but there are only a few of these items of considerable amount on which there is a real dispute. I think the equipment rental is one of

the ones on which there is a good deal of difference here, loss of profits, and this item has just been under discussion here, the efficiency loss.

All right, you may proceed.

(Closing argument of counsel.)

(Whereupon, the court was adjourned until 2:00 o'clock p.m. on February 27, 1958.) [1598]

Thursday, February 27, 1958—2:00 o'Clock P.M.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit.)

(Closing argument of counsel continued.)

OPINION

The Court: I think, first, I should say that I believe everybody is agreed that this award or amount that the Court should fix in this case should be on a basis of compensation, or a compensatory basis. There isn't involved here any element of punitive damages or particular, then. We don't have punitive damages in this State, but even if we did, I should say that this is not a case in which it could be properly applied because here there is no element of malice or anything of that sort. I think the leaders of these unions acted in the utmost good faith and fully believed, and probably still believe, that they were acting within their rights when they called this strike, so, we have got here no cause for

increasing these damages or trying to increase them above what is fair compensation to the plaintiff, above what is the loss sustained by the [1599] plaintiff, by reason of the breach of the labor contract on the part of the defendant. Of course, as far as the defendants are concerned, it is merely an error of judgment. Of course, if this case is carried up, as I suspect it might be, and is reversed, then, it would turn out to be an error of judgment on the part of the Court. I might say, too, by way of introduction that I am going to keep my explanation as to why I am making these findings, trying to keep it to a minimum. The longer I am on the trial bench it is borne home to me that lengthy explanations are not of much use because the winner is only interested in how much you are doing for him and it is the fact that the loser is not satisfied with your explanation, anyway. He always thinks that they are cockeyed, if I may use the venacular.

First of all, of course, we have this problem of the length of time that we may fairly say that the contractor was delayed by reason of this strike. Now, I think it goes without saying that you can't take a period of time and strike seventy-six days out of the middle of a big contract and not do damage, and serious damage, to the contractor, not only for the seventy-six days but beyond that point, because you can't pick up again, as has been brought out here and go on with the same dispatch and efficiency that you would have if the strike had not occurred. The question, then, or the problem, that I have is to determine how much time, [1600] extended time,

should be allowed as to the basis of these various computations, where the time element is a factor. I think that I have no quarrel with the method that has been adopted here by the plaintiff, as exemplified in their Exhibit 24, this revenue progress graph. I do think, however, that it is, perhaps, shall I say, over-optimistic, or I think it overlooks one factor that I think should be considered here. At the time this strike occurred the plaintiff was eighteen days behind schedule, that is, the actual revenues received were eighteen days behind the original scheduled revenue. Those eighteen days had been taken out, of course, and the defendants have not, in his computations, been charged with the eighteen days, but I am not altogether satisfied with the explanations that have been given here, and it is my duty, as the trier of the facts, to determine what credit and weight shall be given to the testimony of witnesses with these explanations.

In the first place, I think that engineers as competent and as capable and experienced as those of Morrison-Knudsen would not completely overlook the weather element in estimating a schedule here in setting up a progress schedule for work to be done December, January, February and March. In the tri-city area there have just been two very severe winters, and very cold and unusually cold weather in not only the winter months, but in early [1601] spring months, in that area. And I notice from this chart that not only was the plaintiff eighteen days behind when the strike started but the two lines were diverging and continuing to diverge. I don't

know what accounts for it here, there is probably an explanation of the fact that they were actually ahead of schedule slightly during January and just about on schedule near the first of February and then there is a sharp diversion, the performance line starts to fall below the schedule line and it continues to fall and they continue to separate at what appears to be about the same rate right until about the time the strike started. Now, it doesn't seem to me that it would be realistic for me to assume that had no strike occurred that there would have been a sharp, unaccountable jump in that lower line that would have immediately carried it on a parallel with the other one. In other words, that the rate of fall behind would have immediately stopped and would have reversed and there had no strike occurred, instead of being in a position of falling behind at a fairly constant rate the contractor would suddenly and miraculously have started to parallel the scheduled line; and I think it is fair to assume that there would have been some time consumed there, some appreciable time to get the contractor in a position where he would have been performing according to the scheduled program.

Now, in this and in a good many other instances here [1602] I am not going to attempt to adopt some theory by which I can say, "Yes, this is \$100.05 or fifty-six or seven cents." I don't think in a case of this kind it is possible to determine with dollars and cents accuracy. As Mr. Carey has so clearly pointed out, the plaintiffs have not been able to do that as the lawsuit progressed here and I don't

think they should expect to Court to do so. There are some of these things that are matters of estimates. Of course, I want to say just as an aside, that I think Mr. DeGarmo is correct in saying that all that is required of him is to prove things with reasonable certainty that one who does damage to another, either in tort or by contract, is not in a position to say that, "You can't prove it by dollar accuracy and, therefore, you can't prove it by anything."

I think that, and I admit that it simply has to be an arbitrary determination. I think that instead of adding twenty-two days that it is fair, then, to let the plaintiff add thirteen days to the actual strike period of seventy-six days, which would make an extended period for the basis of computation of eighty-nine days, approximately, I will say "approximately," so that the result will be that there will be a ten per cent reduction in all those items of claimed damage of the plaintiff to which the time element applies.

Now, taking the items up separately here, I will not [1603] discuss the ones on which the amount is stipulated, concerning which there is no dispute because it goes without saying that in the findings they will be allowed as stipulated.

On Item No. 2, which is "Office Rent, Furnishings and Engineering Department," I think, perhaps, that the basis of computation may be somewhat high but there hasn't been any other offered here except the proposition that nothing should be allowed; I believe the defendant takes the position

that nothing should be allowed. The claim is \$1,156 for the plaintiff, and I am not impressed by the fact that because of internal bookkeeping reasons, or accounting reasons, these items haven't been charged to this particular project. I don't think that that is controlling and I don't think it is controlling in any instance. It may be of some probative value in some instances, as rent of equipment, but, certainly, it isn't something that should bind the plaintiff here, particularly, as has been pointed out since the plaintiff, after all, is Morrison-Knudsen Company and not a contractor on a single contract in the tri-city area, and whatever loss Morrison-Knudsen may have sustained is compensable and allowance should be made for it, even though it may not show up at all on the books of the company for their accounting purposes, and so that item will be allowed.

Mr. Etter: Is that Item 2? [1604]

The Court: That is Item 2. I believe on the transportation, I believe I misspoke on that. I think on Item 2 the plaintiff claimed \$1,168.38 and the defendant conceded two hundred eighty-two forty-eight, I think.

Mr. DeGarmo: That is correct, on the seventy-six-day basis.

The Court: Then, on the Item 3, which is "Transportation," as was indicated in Mr. DeGarmo's argument, I don't think they should be required to prove that by their books or by documentary proof, but I think there should be some direct evidence of it, something that goes beyond hearsay, and I think

the only proof on which I could base a finding on that item is the testimony as to transportation by the witness, Reed, which, if my computation is correct, including his long distance travel and his local travel, if I may put it that way, was \$344.00. Now, as Mr. DeGarmo pointed out, there, undoubtedly, must have been some other travel there. My conscience is eased a little bit on that score, but I think ten cents a mile is too high for mere operation of a vehicle. There isn't any evidence in the record here, and I don't know whether I can take judicial notice of government rates, but the government allows ten cents a mile for full compensation to cover gasoline and oil and license and taxes and insurance and everything, new tires, and on a new vehicle, of course, that may be a little [1605] low, but it is supposed to be on a compensatory basis for everything, but ten cents a mile is too much for gas and oiling the machine for a little while, so that I think that my allowance to Mr. Reed is higher than it should be.

Mr. Carey: May I inquire, your Honor, what is the final amount on that?

The Court: \$344.00. What I am intending to allow is Mr. Reed's claim.

Mr. Carey: Yes, I understand.

The Court: And, of course, if my figures are wrong here, you may correct me in making up the findings.

Then the item of "Telephone," the amount claimed was \$625.86. The defendants conceded a less amount, based on the lesser period. I think that

item will be allowed. However, with the ten per cent reduction that I have indicated here. I might say I may be mistaken about that but it is my understanding that the items which would be affected by the ten per cent reduction by reason of my reducing the delay factor here due to the strike would be Item 1, "Overhead-Salaries during Strike Period"; 2, "Office Rent, Furnishings and Engineering"; Item 8, "Equipment Rentals"; Item 10, "Interest on Investment"; Item 12, "General Administrative Expense"; Item 15, "Maintenance of General Electric Offices"; and Item 16, "Efficiency Loss for Labor and Supplies"; and I suppose [1606] Item 17.

Mr. DeGarmo: Item 17 and Item 1 are agreed items.

The Court: They are agreed items, I think that is correct. I overlooked that, those two are agreed, yes, I think that is true. I was just considering whether they would be in the nature of continuing services or items.

Now, one of the troublesome items here, of course, is the Item No. 8, "Equipment Rentals." There, I think, without going into too much detail I think that the basis of the book rentals of Morrison-Knudsen are too low. I think that the rentals on the basis of what, in effect, would be charged or would be received if an owner owned a vehicle and rented them out to another is too high and I have decided on that item an allowance of \$21,043.13. I may say here that in announcing these items I have made some notes here as the argument progressed, and

I am giving these amounts without the ten per cent reduction, and if there is, they are the ones to which the ten per cent time decrease applies; the figures I give here should be reduced ten per cent. I think I have already done that, or made an announcement in one of these hearings that it should be.

Mr. DeGarmo: Do I understand, then, that the \$21,043.13 would be reduced a further ten per cent?

The Court: Yes, that is correct, and that will be true as to any of these to which that element applies.

Now, Item No. 9 was withdrawn, of course. No. 10 [1607] "Interest on Investment" will be allowed in the amount claimed by the plaintiff, which is eighteen hundred four sixty-eight.

Mr. DeGarmo: That would be less ten per cent?

The Court: Yes; less ten per cent.

Mr. Etter: We had better announce these as we go along.

The Court: All right, well, that would be No. 10. And No. 12 is "General Administrative Expense"; that will be allowed in the amount claimed by the plaintiff, \$19,257, less ten per cent. Item 13 is stipulated, is it not?

Mr. DeGarmo: Yes; it is.

Mr. Etter: Yes.

The Court: And Item 14 is stipulated. 15 will be allowed in the amount claimed by the plaintiff, that is, "Maintaining General Electric Offices in the area" in the amount of \$531.76, less the ten per cent. And "Efficiency Loss for Labor and Supplies"

will be allowed in the amount of \$84,370.98, less ten per cent.

Mr. Carey: I didn't get that number, your Honor, or that amount.

The Court: \$84,370.98, less ten per cent.

On the matter of whether the plaintiff is entitled to a loss of profit, we no longer have, of course, Mr. DeGarmo feels that it wouldn't be any duplication at all, but [1608] any concern the Court may have had about that so far as the rental of vehicles is concerned doesn't apply now, of course, because I have not allowed that, as I feel, on a profit basis. I do think this, that we should keep in mind that what we are trying to do here is to compensate the plaintiff for the loss sustained by this strike. Now, if the job had been performed, as I mentioned in the earlier stages of the trial, I believe, it seems to me that if the job had been completed on time, if it had been completed according to schedule the same day that they intended, as it was planned to complete it when they started out, and all the items of additional expense to them they had been put to by reason of the strike had been allowed them, we will say that they had to hire more vehicles, they had to hire more men, they had to accelerate and step up this job, they had to complete it and they did complete it on time, and they are paid for their actual extra expenses by what occurred, I don't think they would have been entitled to this additional; I don't think they would have been compensated where they haven't completed it on time where, as I have found here, there is an additional eighty-nine days, or a

factor of approximately that, that they have been caused to incur because of the strike. I think, then, that any part of their set-up here or part of their damages where the equipment could have been used on another job, [1609] not that it would have been or anything of the sort, but where equipment or supplies or personnel or administrative set-up ready for service is held idle or held less than its full use for that period of delay, I think the plaintiff should be entitled to a ten per cent, on the other hand, and probably profit on those items. Now, I don't know whether I make myself clear or not, but here, for instance, let's take the element here of "Legal Expense." Why should ten per cent be added to the \$750 legal expense because this contract was delayed for a period of seventy-nine days, we will say? Or because extra strength cement was used in the amount of \$675, why should ten per cent be added to that? On the other hand, clearly, I think, in the terms of "Equipment Rentals" where I haven't allowed them any profit for loss of use of that equipment, I think that equipment was standing idle and they lost a period of use for it, I think they are entitled to the ten per cent acceleration of added profit on that item.

Now, I think that the items on which profit should be allowed instead of allowing it on all of them, as plaintiff has claimed, I am reading now from Plaintiff's Exhibit 49, I think, would be Item 1, Item 2, Items 8, 10, 12, 15, 16 and 17, and I hope on that basis that the riddle of fixing out and drafting findings and judgment will not be too difficult. I might

suggest here, Mr. DeGarmo, I should [1610] assume that you would take the initiative here in preparing these documents but I don't believe that you should be required to sponsor them or put on that they are presented by you because you should be free to, at least, cross-appeal on these items, if the plaintiff appeals, because I think they should be the findings of the Court, and I will simply ask you, as an accommodation to me to prepare them for me.

Mr. DeGarmo: I will be glad to do that.

The Court: Just put on an acknowledgment of service by either side.

Mr. Etter: Your Honor, did you say Item 16? I am having a little difficulty, maybe I am dumb; ten per cent on that is profit? How could the use of vehicles be made a profit? That is just the loss, as I understand it, of labor that was working there. Is there a profit on that?

Mr. DeGarmo: Why, surely.

Mr. Etter: Well, why? I can't follow you.

The Court: It was somewhat of a puzzle to me, I will admit that, not in this connection, of course, but I thought the time element did enter into it.

Mr. Etter: They had an efficiency loss of a cost element of labor. Now, once they are paid that, would that be profitable, that ten per cent profit on that labor?

Mr. DeGarmo: Well, every item of labor that we performed requires general administrative expense. [1611]

Mr. Etter: Yes, but you got your profit on the labor and, now, you got the efficiency loss back.

The Court: I think you are right, the efficiency loss for labor and supplies on my theory should not be. The general administration, yes, I have allowed it on that.

* * *

[Endorsed]: Filed July 7, 1958. [1612]

United States District Court, Eastern District of
Washington, Southern Division

No. 1105

MORRISON-KNUDSEN COMPANY, INC., a
Corporation,

Plaintiff-Appellee,

vs.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839; and INTERNA-
TIONAL UNION OF OPERATING EN-
GINEERS, LOCAL No. 370,

Defendants-Appellants.

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the original documents filed in the above-entitled cause, to wit:

Date Filed	Title of Document	Page No. (this refers to the number appearing in the lower right-hand corner of each page)
5/ 8/56—	Complaint	1- 11
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6/ 8/56—	Answer of Engineers.....	16- 19
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number appearing in
the lower right-hand
corner of each page)

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All exhibits received in evidence
at the trial (Separately bound).

Plaintiff's Exhibits:

No. 1—Copy of Contract Between M. K. and
A. E. C.

2—Agreement, AGC and Teamsters.

3—Agreement, AGC and Operating En-
gineers.

Defendant's Exhibits:

No. 4—Agreement, AGC and Operating En-
gineers.

5—Withdrawn.

Plaintiff's Exhibits:

No. 6—Constructive Collective Bargaining
Agreements.

Defendant's Exhibits:

No. 7—Hanford Contract Proposal.

Plaintiff's Exhibits:

No. 8—Letter, March 30, 1956.

9—Letter, April 3, 1956.

Defendant's Exhibits:

No. 10—Copy letter, 3/8/56.

Plaintiff's Exhibits:

No. 11—Calendar, 1955, 1956, 1957.

Defendant's Exhibits:

No. 12—Letter, 12/15/55, Hanford Contractor's
Negotiating Committee.

13—Letter, 1/13/56, Hanford Contractor's
Negotiating Committee.

14—Memo Agreement, International Union
Operating Engineers 370 and Hanford
Contractors Negotiating Committee.

15—3/2/56—Letter, Hanford Cont. Negot.
Committee.

16—12/29/55—Letter, Hanford Cont. Negot.
Committee.

Plaintiff's Exhibits:

No. 17—School District Contract.

18—School District Contract.

19—Ordinance and Amendment.

20—Copies of letter from Secretary of War.

21—Construction Status Chart, 100-F Area.

22—Construction Status Chart, 100-H Area.

23—Revenue Tabulation.

24—Graph of Schedules and Production.

25—Statement of Delay Due to Strike.

26—List of Overhead Salaries (Item 1).

27—List of Cost of Transportation (Item 3).

28—List of Re-employment Costs.

29—List of Equipment Rental.

30—List of General Administrative Ex-
pense.

31—Cost of Extra Strength Concrete.

Plaintiff's Exhibits—(Continued):

- 32—List of Extra Cost Due to Wage Increase.
- 33—List of Efficiency Loss.
- 34—Contractors Equipment Ownership Expense.
- 35—Compilation of Rental Rates.
- 36—List of Telephone Expense.
- 37—List of Office Maintenance Expense.
- 38—Schedule of Transportation and Isolation Pay.
- 39—Expenses of Lee Knack.
- 40—Voucher for Telephone Bill.
- 41—Voucher for Telephone Bill.
- 42—Voucher for Telephone Bill.
- 43—Voucher for Telephone Bill.
- 44—Voucher for Area Telephone.
- 45—List of Extra Office Cost.
- 46—List of Telephone Expense.
- 47—Statement of Attorney Fee.
- 48—Compilation of Interest on Investment.
- 49—Compilation of Loss of Profits.

Defendant Teamster's Exhibit:

- No. 50—DeGarmo's Letter of 4/27/56.

Plaintiff's Exhibits:

- No. 51—Bulletin on Equipment Accounting Procedure.
- 52—Balance Sheet.
- 53—Computation of General Administrative Expense.
- 54—Computation of Excess Labor Cost.

Plaintiff's Exhibits—(Continued):

55—Computation of Attorney Fee.

Defendant's Exhibit:

No. 56—Audit of Morris, Lee & Co.

and that the same constitute the record for hearing of the appeal from the Judgment of the United States District Court for the Eastern District of Washington, as called for in appellant's Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 11th day of July, 1958.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, U. S. District Court, Eastern District of
Washington.

No. 16102. United States Court of Appeals for the Ninth Circuit. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, Appellants, vs. Morrison-Knudsen Company, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed: July 18, 1958.

Docketed: July 21, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Civil Action No. 16102

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839, and INTERNA-
TIONAL UNION OF OPERATING EN-
GINEERS, LOCAL No. 370,

Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a
Corporation,

Appellee.

APPELLANTS' POINTS ON APPEAL

I.

The Contract between Morrison-Knudsen Company, appellee, and Atomic Energy Commission dated November 25, 1955, was to be performed wholly within the limits of Hanford Atomic Energy Project (Hanford area), a Federal enclave or reserve acquired and used by the Federal Government for purposes of national defense and incidental activities. That area, as a matter of law, is not part of the territory described in the two labor contracts for the alleged breaches of which appellee is claiming damages.

II.

In the alternative, if Point I is not sustained as stated, then the trial court was in error in striking appellants' affirmative defense and in denying appellants' claim that as a matter of fact when negotiating said labor contracts the parties did not intend to include the Hanford area as part of the territory covered by the labor contracts, because the term "Benton County" as used was intended to mean only that part of Benton County that remained after the Federal Government had severed the lands constituting the Federal reserve from Benton County as it existed prior to the Federal acquisition.

III.

The trial court was in error in holding that the appellee had proved a breach of either of the labor contracts involved, but should have held that there was a complete failure of proof because:

(a) Morrison-Knudsen Company, appellee, is not a party to either of the labor contracts involved.

(b) Morrison-Knudsen Company, appellee, itself precipitated the work stoppage or strike which it claims resulted in damages to it by summarily refusing to pay isolation pay and furnish bus transportation in violation of its commitment to both the Atomic Energy Commission and the unions to continue the conditions prevailing when on November 28, 1955, it commenced the performance of its contract with the Atomic Energy Commission.

(c) If Morrison-Knudsen Company, appellee, is a party to the two labor contracts which it now claims became applicable to its work in the Hanford area, nevertheless, it wholly failed to comply with the provisions of those contracts by making written demand for arbitration when the dispute arose respecting its commitment to continue to pay isolation pay and to furnish bus transportation.

IV.

Morrison-Knudsen Company, appellee, failed to prove any joint and several liability in the amount of \$147,284.41, or in any amount. The evidence fails to establish what amount, if any, is properly chargeable to Teamsters Local 839 and what amount, if any, is properly chargeable to Engineers Local 370. The failure to make such proof is fatal to appellee's case, because Teamsters Local 839 was not a party to the contract between Associated General Contractors and Operating Engineers Local 370 and, likewise, Operating Engineers Local 370 was not a party to the contract between Associated General Contractors and Teamsters Local 839.

V.

Assuming, but not admitting, that Morrison-Knudsen Company, appellee, did prove its right to recover damages in some amount against one or the other, or both, of the appellants, nevertheless, the award of \$147,284.41 is excessive. The evidence does not sustain the allowances made by the trial court

for Items 1, 8, 12, 16 and 11 shown on plaintiff's Exhibit 49:

Item 1. Overhead salaries during strike period claimed and allowed in the amount of \$13,389.00.

Item 8. Equipment rentals claimed in the amount of \$27,043.13 and allowed in the amount of \$18,938.82.

Item 12. General administrative expense claimed in the amount of \$19,257.00 and allowed in the amount of \$17,331.30.

Item 16. Efficiency loss for labor and supplies claimed in the amount of \$89,370.98 and allowed in the amount of \$75,933.89.

Item 11. Loss of profits claimed in the amount of \$16,592.34 and allowed in the amount of \$5,936.29.

BASSETT, DAVIES &
ROBERTS,

/s/ STEPHEN V. CAREY,
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Helpers of America, Local No. 839.

/s/ R. MAX ETTER,
Attorney for Appellant, International Union of Op-
erating Engineers, Local No. 370.

Receipt of copy acknowledged.

[Endorsed]: Filed September 9, 1958.

United States Court of Appeals
For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
LOCAL No. 839, and INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL No. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLANTS' OPENING BRIEF

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FILED

FEB - 9 1958

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
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United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, LOCAL NO.
839, and INTERNATIONAL UNION OF OP-
ERATING ENGINEERS, LOCAL NO. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a cor-
poration, *Appellee.*

No. 16102

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLANTS' OPENING BRIEF

JURISDICTION

Morrison-Knudsen Company, Inc., appellee, is a large contracting firm with headquarters at Boise, Idaho. On November 25, 1955, it entered into a contract with the United States Atomic Energy Commission for the construction of extensive facilities at the Hanford Atomic Products Operation and commenced the performance of the work on November 28, 1955. In the prosecution of that work it employed members of the two appellant unions, namely, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 839 and International Union of Operating Engineers Local 370 (hereinafter in this

brief called Teamsters Local 839 and Operating Engineers Local 370).

In February, 1955, prior to the commencement of the work the appellee had become a member of Associated General Contractors of America, Inc., Spokane Chapter. On December 19, 1955, a labor contract was entered into between Associated General Contractors and Teamsters Local 839. On December 24, 1955, a labor contract was entered into between Associated General Contractors and Operating Engineers Local 370. These contracts both took effect as of January 1, 1956. On March 22, 1956, a work stoppage occurred and continued until June 6, 1956. Claiming that this work stoppage constituted a strike in violation of certain provisions of these two labor contracts, appellee brought this action for damages.

The appellee invoked jurisdiction of the District Court solely under Section 301 of the Labor Management Relations Act of 1947, otherwise known as 29 U.S.C.A., Section 185, which provides:

“Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”

A judgment awarding appellee damages in the sum of \$147,284.41 with interest and costs originally entered on April 14, 1958 (Tr. 144-148) was amended by

an order entered on May 8, 1958 (Tr. 171-174). An appeal to this court from that judgment was taken on May 12, 1958 (Tr. 174-176). The appellate jurisdiction derives from 28 U.S.C.A., Section 1291, which provides that

“The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.”

PROCEEDINGS BEFORE TRIAL

In its original complaint filed on May 8, 1956 (Tr. 3-12), while the work stoppage was still existing, the appellee named five defendants, namely:

- 1) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 839
- 2) Joint Council of Teamsters No. 28
- 3) Western Conference of Teamsters
- 4) International Union of Operating Engineers, Local No. 370, and
- 5) International Union of Operating Engineers, A.F.L.

Later and after the work stoppage had ceased the appellee filed an amended complaint (Tr. 12-20), seeking damages in the sum of \$248,127.00 which it claimed had been sustained while the work stoppage continued from March 22, 1956, until June 6, 1956. In this complaint the International Union of Operating Engineers A.F.L. was not named as a defendant. Still later and at an early stage of the trial Joint Council of Teamsters No. 28 and Western Conference of Teamsters were dismissed (Stipulation Tr. 121-122). No appeal has been

taken from the dismissal of those two defendants, and hence the case now stands in this court as if it had been brought by the appellee as plaintiff against Teamsters Local 839 and Operating Engineers Local 370 only.

The case was tried on the issues made by the amended complaint (Tr. 12-20); the separate answer of Teamsters Local 839 (Tr. 21-26); the separate answer of Operating Engineers Local 370 (Tr. 26-31) and appellee's replies to each of those answers (Tr. 31-33 and Tr. 33-34).

Three exhibits were attached to the original complaint identified as A, B and C. By reference these exhibits were made a part of the amended complaint and on the trial became Exhibits 2, 3 and 50. They will be so referred to throughout this brief.

Exhibit 2 is a contract dated December 19, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and five Teamster locals, including the appellant Teamsters Local 839.

Exhibit 3 is a contract dated December 24, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and the appellant, Operating Engineers Local 370.

Exhibit 50 is a letter dated April 27, 1956, from appellee's attorneys to the two local unions.

The amended complaint alleged the corporate existence of the plaintiff-appellee, that it was engaged in an industry affecting commerce as defined by the Labor Management Relations Act of 1947; the existence of the two local unions as labor organizations, and that the

action was brought and was being prosecuted under the provisions of Section 301 of that Act—29 U.S.C.A., Section 185 (Tr. 14).

The amended complaint then alleged that on November 25, 1955, the appellee entered into a contract with the United States Atomic Energy Commission for the construction of certain facilities at the Hanford Atomic Products Operation, and on November 28, 1955, it commenced the performance of the work, employing members of Teamsters Local 839 and Operating Engineers Local 370; that the appellee was a member of Associated General Contractors of America, Inc., Spokane Chapter; alleged the execution of the two labor contracts (now Exhibits 2 and 3), quoting certain provisions of those contracts to which reference will be made later.

The amended complaint then alleged that the two local unions violated the contracts by demanding "isolation pay" of \$2.62 per day for their members and by demanding free transportation for their members from the North Richland bus terminal to the work site, which demands were refused by the appellee. It then alleged that upon the refusal of the appellee to accede to what it claimed to be illegal demands the job was picketed and a strike occurred, causing damage to the appellee in the sum of \$248,127.00.

The answer of Teamsters Local 839 (Tr. 21-26), after making admissions relative to the corporate existence of the appellee and its own existence as a labor union, admitted that the appellee was attempting to prosecute the action under the provisions of Section 301 of the

Labor Management Relations Act of 1947, 29 U.S.C.A., Section 185, but denied that the appellee had any cause of action by reason of any of the matters alleged in its amended complaint. It admitted that the appellee had been performing construction work for the United States Atomic Energy Commission within the Hanford Atomic Products Operation and employed members of Teamsters Local 839. It admitted that that area is in part within the exterior limits of Benton County, Washington, but denied that the said area for the purposes of its labor contract is a part of Benton County. It admitted the execution of the contract of December 19, 1955 (now Exhibit 2). It denied any breach of said contract and denied that the appellee had been damaged as claimed.

This appellant then affirmatively alleged (Tr. 24) and the appellee by its reply admitted (Tr. 32), that the contract between the appellee and the United States Atomic Energy Commission related to and was limited to construction work to be performed wholly within an area located within the exterior limits of Benton County, Washington, and the adjoining Counties of Franklin, Yakima and Grant acquired by the Federal government with the consent of the State of Washington for purposes of national defense and so used by the Federal government and its agencies for purposes designated in Atomic Energy Act of 1946. The answer further alleged that the area within which the appellee was performing work for the Atomic Energy Commission, although in part within the exterior limits of Benton County (Tr. 25), had always been regarded by labor unions and by contractors as segregated from the re-

mainder of Benton County for the purpose of negotiating labor agreements and was so regarded when the labor agreements in question were being negotiated. It was then alleged that for many years prior to and during the year 1955 all contractors contracting with United States Atomic Energy Commission for the performance of construction work within said area had negotiated their labor agreements with labor unions, including Local 839, through a bargaining representative known as "Hanford Contractors Negotiating Committee," and all of such contractors who at the same time were engaged in performing construction work in Benton County and adjoining counties but not within said area negotiated their labor agreements with labor organizations, including Local 839, through another and different bargaining representative known as "Associated General Contractors of America, Inc., Spokane Chapter." It was then alleged (Tr. 25) that the labor contract of December 19, 1955 (Exhibit 2) did not apply and was not intended to apply to construction work to be performed by appellee for the Atomic Energy Commission under the contract described in paragraph IV of the amended complaint. These latter allegations of the affirmative defense were denied by appellee's reply (Tr. 34).

The answer filed by Operating Engineers Local 370 to the appellee's amended complaint (Tr. 26-31) made similar admissions and denials as were made in the answer of Teamsters Local 839 and the reply of the appellee to the answer of Operating Engineers Local 370 made similar admissions and denials (Tr. 31).

Article II of the Teamsters contract (Exhibit 2) entitled "Territory and Work Covered" reads:

"Section 1. This Agreement shall cover all Heavy, Highway and Engineering construction work in the following counties or parts of counties East of the 120th Meridian: Grant, Ferry, Stevens, Pend Oreille, Chelan, Lincoln, Spokane, Adams, Whitman, BENTON, Okanogan, Douglas, Kittitas and Yakima in the State of Washington; * * * "

(Exhibit 2, page 4)

The same description of "territory and work covered" appears in the contract of Operating Engineers Local 370 (Exhibit 3, Article II, page 4).

Article IX of the Teamsters contract (Exhibit 2) entitled "Settlement of Disputes and Grievances" reads:

"Section 1. If a dispute involving the application or interpretation of the Agreement shall arise (other than jurisdictional disputes) written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either Contractor or the affected Union) to the other. If the two (2) parties are unable to adjust the same within forty-eight (48) hours, the dispute shall be settled by the following procedure: * * *. (Exhibit 2, page 11)

A similar provision is included in the contract of Operating Engineers Local 370 (Exhibit 3, Article X, page 9).

The claim of the appellee is that the work it undertook to perform for the Atomic Energy Commission was being performed "in Benton County, Washington." The appellants insist that after its acquisition by

the Federal government the area in which the work was to be performed was no longer a part of Benton County.

After the case was at issue the appellee filed a bill of particulars detailing the damages claimed amounting to \$248,127.00 (Tr. 35-36), and later filed an amended statement of damages claimed amounting to \$238,180.93 (Tr. 37-48).

The case was originally filed in the Southern Division of the Eastern District of Washington. With the approval of the trial court, it was stipulated that it would be transferred for trial from Yakima to Spokane and should first be assigned for hearing to determine the question of liability only, and if liability should be found in favor of the appellee the trial would be continued and assigned for hearing at a later date for the determination of damages (Tr. 51-52).

Prior to trial the appellants made requests for admissions under Rule 36 (Tr. 53-58), which were answered by appellee (Tr. 58-62), and later the appellants made supplemental requests for admissions (Tr. 62-63), which were likewise answered (Tr. 64-65). These requests and answers relate to proceedings in the United States District Court for the Eastern District of Washington pursuant to which the Federal government by condemnation acquired the area in question for the establishment of a military reservation while the war between the United States and Japan was being waged.

TRIAL OF ISSUE OF LIABILITY

The hearing to determine liability began on June 10,

1957. The evidence on that issue appears in the Transcript of Record, Volume 1, page 179, to Volume 3, page 785.

At the commencement of this hearing counsel for the appellee moved to strike the affirmative defenses as pleaded in the appellants' answers, the sole ground of the motion being that to receive evidence in support of those defenses would violate the Parol Evidence Rule (Tr. Vol. 1, pp. 182-184). That motion was granted for that reason alone (Tr. Vol. 1, p. 190).

After the court, on appellee's motion, had stricken the appellants' affirmative defenses as pleaded in their answers, and later during the course of the liability hearing the appellants amended their answers to affirmatively plead that:

“On November 25th, 1955, the plaintiff entered into a contract with the United States Atomic Energy Commission for the construction of certain facilities wholly within the limits of the said area above described acquired by the United States for purposes of national defense, and on or about November 28th, 1955, it commenced the performance of said work. To perform the work it had to do under said contract, it became necessary that plaintiff employ members of said local unions 839 and 370. For many years prior to the commencement of that work, there had been in full force and effect a certain labor contract negotiated by said Hanford Contractors Negotiating Committee defining the terms and conditions applicable to work within said area, including provisions that the workmen, in addition to stipulated hourly wages, should be paid an additional amount known as ‘isolation pay’ and should also be furnished bus

transportation to and from their particular places of employment within the Hanford area.

“At the time of the commencement of the work, plaintiff agreed with defendant locals 839 and 370 that said Hanford contract should apply to said job until completed and, although termination notice of said contract was made on December 29th, the terms of said contract were applied until after March 20, 1956.

“Beginning about March 8, 1956, the plaintiff sought to apply to said work the provisions of certain other contracts, namely, Exhibits A and B attached to the plaintiff’s original complaint, both less favorable to defendants’ members; that on or about March 22nd, 1956, the plaintiff definitely refused to abide by commitments and the work stoppage described in the amended complaint occurred and continued until June 6, 1956, when work under the original conditions, including ‘isolation pay’ and free bus transportation, was resumed.

“The loss, if any, sustained by plaintiff was caused solely by its said refusal to abide by its commitments relating to the payment of ‘isolation pay’ and the furnishing of bus transportation.” (Tr. Vol. 2, pp. 446-447)

Twenty exhibits were introduced during the liability hearing. These are listed in Appendix 1 in the order of their introduction and, to the extent deemed necessary, will be referred to later.

The witnesses examined orally on behalf of the appellee in opening its case were:

LEE J. KNACK, Labor Relations Director of the appellee (Tr. Vol. 1, pp. 192-313).

SAM C. GUESS, Executive Secretary of Spokane Chapter of the Associated General Contractors (Tr. Vol. 1, p. 313, to Vol. 2, p. 401).

RAMON E. REED, appellee's Project Manager in charge of the performance of its contract with the Atomic Energy Commission (Tr. Vol. 1, pp. 401-422).

ARTHUR A. ROSSMAN, Business Manager of Operating Engineers Local 370, called as an adverse witness (Tr. Vol. 1, pp. 422-438) and later recalled (Tr. Vol. 2, pp. 681-695).

The defense witnesses were:

CHARLES J. KNAPP, Secretary of Pasco-Kennewick Building Trades Council, with which the two appellant local unions were affiliated, and also Secretary-Treasurer of the Local Cement Finishers Union (Tr. Vol. 2, pp. 469-551).

WILLIAM H. DUNN, Field Representative of Operating Engineers Local 370 (Tr. Vol. 2, pp. 522-595).

ARTHUR A. ROSSMAN, Business Manager of Operating Engineers Local 370 (Tr. Vol. 2, pp. 596-654).

ROBERT M. LEWIS, Secretary-Treasurer of Teamsters Local 839 (Tr. Vol. 2, pp. 654-668).

HAROLD EDWARD CLARY, Business Representative of Painters Local Union 427, affiliated with Pasco-Kennewick Building Trades Council (Tr. Vol. 2, pp. 669-672).

LAWRENCE R. KING, Business Representative of Millwrights and Machinery Erectors Local Union 1699, affiliated with Pasco-Kennewick Building Trades Council (Tr. Vol. 2, pp. 672-680).

SEWELL DAVIS, who was Secretary-Treasurer of Teamsters Local 839 in the latter part of 1955 and the early part of 1956 and who represented his union during that period of negotiations, died before the trial commenced in June, 1957, and for that reason his evidence was not available (Tr. 654-655).

As rebuttal witnesses appellee examined:

LEE J. KNACK, appellee's Labor Relations Director (Tr. Vol. 2, pp. 700-724).

KENNETH M. McCAFFREE, who was Executive Secretary of Hanford Contractors Negotiating Committee from March, 1953, until October, 1954 (Tr. Vol. 2, pp. 725-759).

FRANCIS H. BACON, Deputy Director of Organization and Personnel for Atomic Energy Commission at its Hanford Works (Tr. Vol. 2, p. 759, to Vol 3., p. 780).

After the conclusion of the liability hearing and before the damage hearing began the appellee submitted proposed findings of fact and conclusions of law on the liability issue, which were adopted by the trial court (Tr. Vol. 1, pp. 123-140).

TRIAL OF DAMAGE ISSUE, ENTRY OF JUDGMENT, ETC.

After the court had entered the liability findings on July 24, 1957 (Tr. 123-140) the case was not reached for further trial to ascertain damages until the following February 24, 1958. In the meantime accountants chosen by the appellants had examined appellee's books with the result that when the damage hearing was held appellee reduced its claim from \$248,127.00, as stated in

its amended complaint, to \$182,515.77, as appears on its Exhibit 49. During this hearing thirty-six exhibits listed in Appendix V, were introduced. The evidence taken on this hearing appears in the Transcript of Record, Volume 3, pages 785-1158. Findings on damage were entered on April 14, 1958 (Tr. 140-143) and on the same day judgment was entered against Teamsters Local 839 and Operating Engineers Local 370, *jointly and severally*, for \$147,284.41, together with interest and costs (Tr. 144-148).

While not required to do so as a condition to appeal, appellants elected to request findings (Tr. 149-168) as Rule 52(b), Rules of Civil Procedure, provides may be done, and also moved to amend the judgment (Tr. 170) by eliminating the provision holding the appellants liable *jointly and severally* for the amount of damages found.

The findings requested by the appellants related primarily to the liability question and especially to the status of the Hanford Atomic Energy Project as a military reservation. Though these requested findings were based upon admitted facts of record, the court refused to make any of them only because

“They are intended to and would provide the factual basis for the legal conclusion that the plaintiff is not entitled to recover against the said defendants, and would necessitate the entry of a judgment dismissing the action.” (Tr. 169)

With that statement we do not disagree.

An order purporting to amend the judgment of April 14, 1958, was entered on May 8, 1958 (Tr. 171-174) and this appeal was promptly taken (Tr. 174-178).

APPELLANTS' POINTS ON APPEAL AND SPECIFICATIONS OF ERROR

I.

The contract between Morrison-Knudsen Company, appellee, and Atomic Energy Commission dated November 25, 1955, was to be performed wholly within the limits of Hanford Atomic Energy Project (Hanford area), a Federal enclave or reserve acquired and used by the Federal Government for purposes of national defense and incidental activities. That area, as a matter of law, is not part of the territory described in the two labor contracts for the alleged breaches of which appellee is claiming damages (Tr. 1155).

II.

In the alternative, if Point I is not sustained as stated, then the trial court was in error in striking appellants' affirmative defense (Tr. 182-183) and in denying appellants' claim that as a matter of fact when negotiating said labor contracts the parties did not intend to include the Hanford area as part of the territory covered by the labor contracts, because the term "Benton County" as used was intended to mean only that part of Benton County that remained after the Federal Government had severed the lands constituting the Federal reserve from Benton County as it existed prior to the Federal acquisition (Tr. 1156).

III.

The trial court was in error in holding that the appellee had proved a breach of either of the labor con-

tracts involved, but should have held that there was a complete failure of proof because:

(a) Morrison-Knudsen Company, appellee, is not a party to either of the labor contracts involved (Tr. 200).

(b) Morrison-Knudsen Company, appellee, itself precipitated the work stoppage or strike which it claims resulted in damages to it by summarily refusing to pay isolation pay and furnish bus transportation in violation of its commitment to both the Atomic Energy Commission and the unions to continue the conditions prevailing when on November 28, 1955, it commenced the performance of its contract with the Atomic Energy Commission.

(c) If Morrison-Knudsen Company, appellee, is a party to the two labor contracts which it now claims became applicable to its work in the Hanford area, nevertheless, it wholly failed to comply with the provisions of those contracts by making written demand for arbitration when the dispute arose respecting its commitment to continue to pay isolation pay and to furnish bus transportation (Tr. 1156-1157).

IV.

Morrison-Knudsen Company, appellee, failed to prove any joint and several liability in the amount of \$147,284.41, or in any amount. The evidence fails to establish what amount, if any, is properly chargeable to Teamsters Local 839 and what amount, if any, is properly chargeable to Engineers Local 370. The failure to make such proof is fatal to appellee's case, because Teamsters Local 839 was not a party to the con-

tract between Associated General Contractors and Operating Engineers Local 370 and, likewise, Operating Engineers Local 370 was not a party to the contract between Associated General Contractors and Teamsters Local 839 (Tr. 1157).

V.

Assuming, but not admitting, that Morrison-Knudsen Company, appellee, did prove its right to recover damages in some amount against one or the other, or both, of the appellants, nevertheless, the award of \$147,-284.41 is excessive. The evidence does not sustain the allowances made by the trial court for Items 1, 8, 12, 16 and 11 shown on plaintiff's Exhibit 49:

Item 1. Overhead salaries during strike period claimed and allowed in the amount of \$13,389.00.

Item 8. Equipment rentals claimed in the amount of \$27,043.13 and allowed in the amount of \$18,938.82.

Item 12. General administrative expense claimed in the amount of \$19,257.00 and allowed in the amount of \$17,331.30.

Item 16. Efficiency loss for labor and supplies claimed in the amount of \$89,370.98 and allowed in the amount of \$75,933.89.

Item 11. Loss of profits claimed in the amount of \$16,592.34 and allowed in the amount of \$5,936.29 (Tr. 142-142, 1157-1158).

VI.

The trial court erred in refusing to permit the appellants to prove on the cross-examination of Sam C.

Guess, one of appellee's witnesses, that on November 3, 1955, when the contract between Associated General Contractors, Spokane Chapter, and Operating Engineers Local 370 was in the process of negotiation, that Dewey Murrow, acting as Chairman of the Contractors Negotiating Committee, stated that they were not then negotiating concerning the Hanford Atomic Energy Project (Tr. 391), and in refusing to permit the appellants to prove by Arthur A. Rossman, a defense witness, that during the negotiations on that date Dewey Murrow specifically stated that they were not negotiating in respect of the Hanford Atomic Energy Project, because the Hanford Works agreement of September 25, 1952 (plaintiff's Exhibit 6) was then in effect and covered that area (Tr. 694-695).

VII.

The trial court erred in denying appellants' motion to dismiss the action at the close of appellee's case in chief for failure to prove that the two contracts of December 19, 1955, and December 24, 1955, effective January 1, 1956, between Associated General Contractors, Spokane Chapter, and the appellant Local Unions (Exhibits 2 and 3) (Tr. 439) were applicable to work within the Hanford Atomic Energy Project (Tr. 445).

VIII.

The trial court erred in adopting and entering as the findings and conclusions of the court the proposed findings and conclusions submitted by appellee on the issue of liability (Tr. 123-140) and entering judgment on such findings and conclusions (Tr. 144-148).

IX.

The trial court erred in refusing to make findings of fact and conclusions of law as requested by the appellants (Tr. 149-168), because to do so would necessitate the entry of a judgment dismissing the action (Tr. 168-169).

ARGUMENT

**Argument on Point I Concerning Status of Hanford
Atomic Energy Project as a Federal Military
Reserve**

The basic question presented for decision is what meaning must be given to the expression "Benton County" as used in the two labor contracts (Exhibits 2 and 3) which the appellee claims were breached by the appellants. The appellee claims that Benton County as used in those contracts means that county as it existed territorially in 1943 before the Federal government, with the consent of the State of Washington, converted the lands now constituting the Atomic Energy Project into a national defense reservation. The appellants insist that as a matter of constitutional law "Benton County" as used in the two contracts means Benton County as it existed territorially in December, 1955, when the contracts were executed more than twelve years after the date of the Federal acquisition. If the appellants are correct as to this the judgment must be reversed and the case dismissed irrespective of the merit or lack of merit in the appellants' other contentions.

The Constitution of the United States, Article I, Section 8, provides that:

"The Congress shall have power * * * to exercise

exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance by Congress, become the seat of government of the United States; *and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;*''

The area in question was acquired by the Federal government for the specific purpose specified in that Section of the Constitution.

Lands acquired by condemnation for Federal uses have exactly the same status as those acquired by voluntary purchase.

Kohl v. United States, 91 U.S. 367, 33 L.ed. 449.

The leading case on the question now under discussion is *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 29 L.ed. 264, decided in 1885. The decision, written by Mr. Justice Field, reviewed the historical background of the quoted constitutional provision, the reasons for it and the earlier decisions construing it. One of the earlier decisions cited and approved was *Commonwealth v. Clary*, 8 Mass. 72, decided in 1811 by the Supreme Judicial Court of Massachusetts, in which that court held that the courts of the Commonwealth (Massachusetts) could not take cognizance of offenses committed upon lands in the Town of Springfield purchased with the consent of the Commonwealth by the United States for the purpose of erecting arsenals upon them.

It would unnecessarily prolong this brief to cite

the scores of decisions since that early Massachusetts case to the same effect. Among the later cases are:

Western Union Telegraph Company v. Chiles, 214 U.S. 274, 53 L.ed. 994 (1909, Norfolk Navy Yard);

United States v. Unzueta, 281 U.S. 138, 74 L.ed. 761 (1930, Fort Robinson Military Reservation in Nebraska);

Arlington Hotel Company v. Fant, 278 U.S. 439, 73 L.ed. 447 (1929, Hot Springs Military Hospital);

Surplus Trading Company v. Cook, 281 U.S. 647, 74 L.ed. 1091 (1930, Army Camp in Arkansas);

Standard Oil Company of California, 291 U.S. 242, 78 L.ed. 775 (1934), holding that the San Francisco Presidio is no part of the State of California and reversing the Supreme Court of California;

Murray v. Joe Gerrick & Company, 291 U.S. 315, 78 L.ed. 821 (1934), holding that the Puget Sound Navy Yard is no part of Kitsap County, Washington, and affirming the Supreme Court of Washington in *Murray v. Joe Gerrick Company*, 172 Wash. 365, 20 P.(2d) 591;

Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285, 87 L.ed. 761 (1943), holding that Moffett Air Field in Santa Clara County, California, is no part of that State, and reversing the Supreme Court of California;

Johnson v. Yellow Cab Transit Company, 304 U.S. 518, 88 L.ed. 814 (1944), holding that

the Fort Sill Military Reservation in Oklahoma is not a part of that State, and affirming a decision of the Court of Appeals of the Tenth Circuit;

Murphy v. Love, 249 F.(2d) 783, the Court of Appeals of the Tenth Circuit made the same decision as to the Fort Leavenworth Military Reservation in Kansas.

As a matter of fact, the question now under discussion has been foreclosed against appellee by two decisions already rendered by this court, namely:

Yellowstone Park Transportation Co. v. Gallatin County, 31 F.(2d) 645;

Rogers v. Squire, 157 F.(2d) 948.

In the earlier of these cases, the decision being by Judge Rudkin, it was held that by force of the quoted constitutional provision lands in Yellowstone Park were not taxable by Gallatin County, Montana. In the second cases, the decision being by Judge Healy, it was held that Fort Douglas in Utah is not a part of that State. And an even earlier decision in this Circuit is *Sharon v. Hill*, 24 Fed. 726, p. 731, decided in 1885.

Prior to the First World War the Federal government acquired a large tract of land in Pierce County, Washington, used for the training of Federal troops. It was first known as Camp Lewis and is now known as Fort Lewis. The Supreme Court of Washintgon had occasion to consider the status of that Military Reservation in *Concessions Company v. Morris*, 109 Wash. 46, 186 Pac. 655. The plaintiff had a concession to operate barber shops in that Army Post. The taxing authorities of Pierce County, within the exterior limits of which

the Army Post was located, attempted to tax the property of that concessionaire. The property sought to be taxed was held to be immune from taxation by Pierce County. Perhaps no more concise statement of the applicable law can be found than appears in that decision, where the Washington court said at page 51:

“Under our law, Rem. Code, Section 9101, only personal property *in* the state of Washington can be listed for taxation, and the question, therefore, must be answered by a determination of whether personal property situated upon this military reservation is *in* the state of Washington. It seems to us that the answer to this is clear, and that such property is *without* the state in both a jurisdictional and territorial sense, for, as we have seen by the constitution of the United States, and the act of the legislature of this state, both the military reservation itself and the jurisdiction and legislation over it have been granted to the United States, and thereby there has been created an independent sovereignty the territory of which is surrounded by the state of Washington, but over which the state of Washington has no jurisdiction. A territory has been created which resembles that of the District of Columbia, the only reservation being that the state of Washington can serve civil and criminal process therein on actions arising outside the reservation.” (Emphasis by the court)

In that quotation the Supreme Court of Washington likened Camp Lewis to the District of Columbia which was acquired in 1789 by the Federal government by cession from Maryland and Virginia for use as the seat of government. The District as originally ceded by the two States was one hundred square miles, of which ap-

proximately two-thirds was on the Maryland side of the Potomac River and the remainder on the Virginia side. In 1846 the Federal government retroceded to Virginia the area obtained from that State, leaving the District as it now exists entirely surrounded by Maryland. The present land area of the District is sixty-one square miles or less than one-tenth the area of the Hanford Atomic Energy Project. If a labor contract should be executed between an organization, like Associated General Contractors, and a labor union, such as Operating Engineers Local 370, describing the area to which it was to be applicable as "the State of Maryland" we are confident that no court would agree that such a description of "territory and work covered" would extend to the District of Columbia because, before its cession to the United States the District of Columbia was part of the State of Maryland and is now entirely within the exterior boundaries of that State.

A more recent case involving the identical question is *Arledge v. Mabry*, 52 New Mexico 303, 197 P.(2d) 884, decided 1948, in which the Supreme Court of New Mexico, relying in part upon Judge Healy's decision in *Rogers v. Squire*, 157 F.(2d) 948, held that lands acquired by the United States by condemnation and incorporated into the Los Alamos Atomic Energy Project are not in the State of New Mexico. The Los Alamos Atomic Energy Project in New Mexico and the Hanford Atomic Energy Project in Washington were acquired at the same time by authority of the same constitutional provision and have been devoted to exactly the same Federal uses. If the Los Alamos Project is not

in or a part of Sandoval County, New Mexico, certainly the Hanford Project is not in and a part of Benton County, Washington.

Another aspect of the same question became involved in *Lowe v. Lowe*, 150 Maryland 592, 133 Atl. 729, a divorce case. The Maryland statute required that any person seeking a divorce must have been a resident of the State for two years next preceding the application. The plaintiff had resided on a Military Reserve within the exterior limits of that State. The lower court dismissed the action for want of jurisdiction and the Supreme Court of Maryland affirmed, stating that land acquired by the Federal government in accordance with Article I, Section 8 of the Federal Constitution ceased to be a part of the State.

Counsel for the appellee may attempt to distinguish the decisions we have cited upon the ground that in the case of the Hanford Project the Federal government did not elect to take *exclusive* jurisdiction as it might have done pursuant to the quoted provision of the Federal Constitution. The Supreme Court of the United States has already settled that question. Article I, Section 8 of the Federal Constitution provides that "Congress shall have *power* * * * to exercise exclusive legislation, etc." Constitutionally, the Federal government, with the consent of the State, may at its election exercise exclusive power, but it is not required to do so. Whether the power to be exercised shall be exclusive or partial or concurrent is a matter for the Federal and State governments to decide as a matter of practical convenience. In *Collins v. Yosemite Park & Curry Company*,

340 U.S. 518, 82 L.ed. 1502, the United States Supreme Court held that:

“The National Government and the various states may make mutually satisfactory arrangements as to their respective jurisdiction over territory within their borders, co-operatively adjusting, in the most effective way, problems flowing from our dual system of government; and arrangements of this kind will be recognized by the courts.” (Syllabus 1)

The fact that the Federal government in acquiring and operating the Hanford Atomic Energy Project did for its own convenience see fit not to exercise the full measure of the constitutional power that it might exercise, does not destroy the identity of the area as a distinct Federal enclave, for, as the Supreme Court of Washington said in the *Fort Lewis* case, that area “is without the State in both a jurisdictional and territorial sense.”

The facts which make the cited authorities controlling are not in dispute. It is elementary that both trial courts and appellate courts will take judicial notice of historical facts sufficiently notorious to be the subject of general knowledge including, among other things, wars in which the United States has been engaged and all matters connected therewith and matters concerning state and local history and especially matters occurring within the limits of the court's own territorial jurisdiction. 20 Am. Jur., Evidence, Sections 50-64, pp. 74-86. Especially in this case the court can take judicial notice of the historical facts relative to the acquisition and operation of the Hanford area. This Court has already

been called upon to consider that subject in *United States v. Priest Rapids Irrigation District*, 175 F.(2d) 524, and *Richland Irrigation District v. United States*, 222 F.(2d) 112. However that may be, the controlling facts in this case were not left as a matter of judicial notice. They were developed by appellants' original and supplemental requests for admissions under Rule 36, Rules of Civil Procedure, and the appellee's answers to those requests (Tr. 53-58; 58-62; 62-63; 64-65). The Court will have in mind that the attack on Pearl Harbor occurred on December 7, 1941, and a declaration of war followed immediately. The undisputed facts developed by the requests for admissions establish that the contract between the United States Atomic Energy Commission and appellee, dated November 25, 1955 (Exhibit 1) covered work to be performed exclusively within the area known as "Hanford Atomic Products Operation" or "Hanford Atomic Energy Project," and frequently referred to during the trial as the "Hanford Area." On February 18, 1943, the war having then been in progress approximately fifteen months, the Secretary of War addressed a letter to the Attorney General stating that it was necessary that the United States acquire certain lands in Benton County, Washington, to be utilized for the establishment of a military reservation and that the utmost haste in expediting the project was vital to the successful prosecution of the war. The proposed establishment was then referred to as "Gable Project." Accordingly, on February 23, 1943, the United States District Attorney for the Eastern District of Washington, at the direction of the Attorney General, filed a condemnation petition in the United States Dis-

trict Court for the Eastern District of Washington, describing the lands sought to be acquired in Benton County, identified as "Area A" containing 176,323 acres, more or less. On that day the court entered an order granting the United States the right of immediate possession upon a showing that the lands were required in time of war for military, naval or other war purposes. Later and on April 12, 1943, the Secretary of War requested that the condemnation petition be amended to include additional lands described as "Areas A, D and E" aggregating a total of 206,123 acres, more or less, of which 199,723 acres were located within Benton County and an additional 6,400 acres, more or less, in Benton, Yakima and Grant Counties. An amended condemnation petition was filed on April 22, 1943, and the court again entered an order granting the United States the right of immediate possession upon a showing that the lands were being acquired in time of war for military, naval or other war purposes. At this time the proposed establishment was called "Hanford Engineering Project." The War Department took possession of all the described lands and thereafter acquired additional lands so that ultimately the Project included in excess of 400,000 acres (625 square miles), the greater portion being within the exterior limits of Benton County. Following the termination of the war Congress passed the Act of August 1, 1946, known as the "Atomic Energy Act" (42 U.S.C.A. Sec. 2011-2281). By authority of that Act the President, by Executive Order No. 9816, dated December 31, 1946 (42 U.S.C.A., page 192, following Sec. 2031) transferred all of the lands and property which at that time

were known as “Manhattan Engineering District, War Department” to the Atomic Energy Commission. At all times since that transfer that Commission has possessed and operated the Project for the production of fissionable material as provided by the Atomic Energy Act of 1946 as amended.

Immediately after the War Department took possession of the described lands it entered into a contract with Du Pont De Nemours & Company for the construction and operation of a plant, the performance of architect-engineer services and other work and services all as directed by the United States Government, and pursuant to such contract and directions fissionable material was produced and used for war purposes. After the transfer of the area to the Atomic Energy Commission it entered into a similar contract with the General Electric Company for the construction of additional plants, the operation of facilities, the performance of architect-engineer services, and for other work and services all as directed by the Atomic Energy Commission, and pursuant to that contract and directions fissionable materials were produced in accordance with the Atomic Energy Act of 1946 as amended by the Atomic Energy Act of 1954.

The contracts of Du Pont and General Electric Companies covered not only the construction and operation of facilities for the manufacture of fissionable materials but also the performance of many related engineering, architectural and research services. The contracts also included the construction, management and operation of extensive housing and business facilities

required to meet the needs of employees, together with all necessary municipal services. The Federal government acquired the lands by purchase and condemnation and has always used them for the construction and operation of a plant for the production of fissionable materials. While the Federal government did not elect to take exclusive jurisdiction of the area, it has controlled all ingress and egress to and from the area and only those with official business and appropriate identification and security clearance have been permitted within the area.

From time to time from February 23, 1943, as the United States acquired additional lands in Benton County and adjoining counties for use as the Hanford Atomic Project Operation, all lands and facilities, the ownership of which became vested in the Federal government, have been immune from taxation by the State of Washington and its political subdivisions, including the County of Benton.

The foregoing facts were developed by appellee's admissions made to the appellants' requests. The appellee also filed original and supplemental requests for admissions under Rule 36 (Tr. 66-85; 86-89; 89-119; 119-121). In the main, these requests and answers developed further facts emphasizing the distinct character of the Hanford area as a Federal reserve. By appellee's requests it was established that after the Hanford area had been transferred to the Atomic Energy Commission by reason of special arrangements between the authorities of the State of Washington, Federal authorities and contractors doing work within the area, compensation to

injured workmen and their dependents was made under a plan similar to the provisions of the Washington Workmen's Compensation Act, but that this plan was administered by special administrative procedures applicable to that area only and not applicable to Benton County or the State generally. That plan for compensating injured workmen and their dependents was established by a contract made pursuant to Chapter 85, Laws of Washington 1943 as amended by Chapter 144, Laws of Washington 1951 (See Request 8, Tr. 68; Answer to Request 8, Tr. 87, and Contract, printed in full at appellee's direction, Tr. 97-119).

The Atomic Energy Act, 42 U.S.C.A. Section 2208, provides:

“In order to render financial assistance to states and localities in which the activities of the Commission are carried on, and in which the Commission has acquired property previously subject to state and local taxation the Commission is authorized to make payments to state and local governments in lieu of property taxes. Such payments may be made in the amounts, and at the times and upon the terms the Commission deems appropriate * * *.”

The appellee saw fit to introduce in evidence Exhibits 17 and 18 (Tr. 767-768). Exhibit 18 is a contract, dated February 16, 1955, between Atomic Energy Commission and Richland School District 400 by which the Atomic Energy Commission assumed the financial obligation of maintaining the public schools, in whole or in part, during the school year 1954. Exhibit 17 is a similar contract, dated February 13, 1956, covering the school year 1955-1956. These contracts both recite that

because all, or substantially all, property that would normally be taxable for the support of public schools had been included in the non-taxable Hanford area, it was necessary that the Atomic Energy Commission advance funds to maintain public schools.

If in 1955 and 1956 Benton County territorially and jurisdictionally was the same Benton County as it had existed territorially before the filing of the condemnation petition on February 23, 1943, why was the Atomic Energy Commission entering into a contract to establish a system of Workman's Compensation applicable to the Hanford area only and making contracts to maintain public schools required because of the activities of the Federal government in that area?

The liability findings proposed by the appellee and adopted by the trial court (Tr. 123-136) fail to state whether the Hanford Atomic Energy Project is or is not a part of Benton County. They simply ignore that vital issue.

The specifications of error next to be argued require an extended reference to the 20 exhibits introduced on the liability hearing (listed and described in Appendix I) as well as detailed reference to much of the oral evidence introduced at that hearing and appearing at various places throughout the three volumes of the printed transcript of record. For more ready reference, we have made an abstract of this oral evidence and are printing it as Appendix II with such comments as seem appropriate. This is a chronological statement of events from December 31, 1946, when the Hanford Area was transferred from the War Department to the Atomic Energy

Commission to May 8, 1956, when the appellee's original complaint was filed.

Argument of Points II and VI

Re Status of Hanford Atomic Works Project

These two specifications of error involve substantially the same general question and may be discussed together.

If, for the reasons stated in the foregoing argument of Point I, the court shall not hold that the Hanford Area, as a matter of constitutional law, is not a part of Benton County, then it will become necessary to consider what the parties intended the term "Benton County" to mean as used in the two labor contracts (Exhibits 2 and 3).

In the preceding section of this brief, entitled: "PROCEEDINGS BEFORE TRIAL," page 3, we stated the substance of the affirmative defense pleaded by both appellants in their respective answers to the effect that the contracts as written do not include, and were not intended to include, the Hanford Area.

Before the introduction of evidence on the liability hearing appellee's counsel made a "motion to strike the affirmative defenses as set forth in the answers of the Teamsters and the Operating Engineers to the amended complaint" (Tr. 182). The only reason then assigned for that motion was that to permit proof as to the circumstances surrounding the parties when the contracts were being negotiated would violate the Parol Evidence Rule (Tr. 183). When granting that motion the court said:

“They (meaning the parties negotiating for Associated General Contractors and for the Local Unions) certainly knew, as everyone knows, what the situation was with reference to the Hanford area and if they did not intend to, if they intended it should be excluded from this contract it seems to me that the lawyers on one side or the other would have spelled it out in plain English and said so.” (Tr. 190)

With the utmost respect to the able and conscientious trial judge, we think that statement is a typical example of begging the question. It is, of course, true that if when the two contracts were being negotiated the Union negotiators had foreseen the possibility that some member of the Associated General Contractors would later claim that the term “Benton County” was intended to include the Hanford area, additional language might have been inserted to expressly preclude that possibility. On the other hand, if it was intended that the term “Benton County” was meant to include the Hanford area the contractors’ representatives might likewise have insisted upon some plain language expressly so stating. If express words of inclusion or exclusion would make the contracts clearer than they are, as the trial judge suggested, that is an admission that in the absence of such additional words of inclusion or exclusion the contracts as written are ambiguous in some degree. If that be so, the Parol Evidence Rule is clearly inapplicable. Bearing in mind that these two contracts, effective as of January 1, 1956, were nothing but a revision and a continuation of the earlier contract of September 1, 1952 (Exhibit 4), which had

never been applicable to the Hanford area, it would seem that if the Associated General Contractors intended to so radically change the existing status territorially, the greater obligation was on it to make the meaning clear beyond doubt. The applicable rule is concisely stated in *Nash v. Towne*, 72 U.S. 689, page 699, 18 L.ed. 527, page 529, as follows:

“Courts, in the construction of contracts, look to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.”

The rule stated in the cited case has been recognized and applied in this Circuit.

In *Nevada Consolidated Copper Company v. Consolidated, etc.* (U.S.D.C. Nev.) 44 F.(2d) 192, page 199, the court said:

“It is a fundamental principle of construction that all contracts are to be construed in the light of the circumstances surrounding their execution.”

That opinion of District Judge Norcross was adopted as the opinion of this court, 64 F.(2d) 440; Certiorari denied 290 U.S. 644, 78 L.ed. 574. Additional authorities on this point are cited in Appendix III.

For the reasons stated in the preceding argument of Point I, the appellants are not claiming that the con-

tracts are ambiguous or uncertain. It is the appellee that injects the ambiguity, if there is one, by insisting that at the time these contracts were negotiated in the latter part of 1955 the Hanford Atomic Energy Project legally, jurisdictionally and geographically was non-existent. However that may be, the striking of defendants' affirmative defenses has now ceased to be of any great materiality.

In the first place, the appellee to prevail had the burden of proving that the two contracts effective January 1, 1956, were applicable to the Hanford area. It was not relieved of that burden because the appellants affirmatively said that they were not applicable.

In the second place, as the trial court indicated at a later stage of the trial (Tr. 377-378), in view of the oral and documentary evidence, the court was no longer concerned with any technical questions of pleading, but rather with the effect to be given to the undisputed evidence.

In the third place, most of the evidence which would have been admissible, if the affirmative defenses had not been stricken, later came into the record under the trial amendment set forth at page 10.

In the fourth place, both the oral and documentary evidence introduced by the appellee itself proves conclusively that the two contracts in question were not applicable to the Hanford area.

The statement of events from December 31, 1946, to May 8, 1956, detailed in Appendix II, needs but little elaboration, but the following vital facts warrant emphasis and some reiteration.

1) On or about September 21, 1955, Kenneth M. McCaffree, who had ceased to have any connection with the Hanford Contractors Negotiating Committee in the previous October, 1954, started an agitation to eliminate isolation pay and bus transportation. Whether at that time Doctor McCaffree was representing or misrepresenting that committee is not of controlling importance. However, the fact is that his intrusion created apprehension on the part of all concerned, including the executives of the Atomic Energy Commission.

2) At that time (September 1, 1955) the contract of September 1, 1950 (Exhibit 4) between Associated General Contractors and the Local Unions and the Hanford Works Agreement of September 29, 1952 (Exhibit 6) were both in effect, the first being applicable to construction work outside of the Hanford area, the other being applicable only to similar work within the Hanford area. Both remained in effect until December 31, 1955.

3) The contract between the appellee and the Atomic Energy Commission for the construction of additional facilities (Exhibit 1) was entered into on November 25, 1955, and performance was commenced on November 28, 1955. In that contract the appellee stipulated to continue the working conditions then existing under the Hanford Works Agreement.

4) On December 15, 1955, Doctor McCaffree submitted his first written proposal (Exhibit 12) which, if accepted by the Unions, would have materially changed the then existing Hanford conditions respecting isolation pay and bus transportation. This proposal

not being accepted, Doctor McCaffree then by his letter of December 29, 1955 (Exhibit 16) gave conditional notice of the termination of the Hanford Works Agreement as of December 31, 1955, but stating that the Hanford Contractors would not stop work as of January 1, 1956, but would maintain wages and conditions in effect on December 31, 1955, until new agreement could be completed and that the wage policy would remain unchanged.

5) The pre-job conference attended by Mr. Knack and Mr. Reed, representing the appellee, and by representatives of the Unions was held at Pasco on January 19, 1956. On that day Mr. Knack, the appellee's Director of Labor Relations, made the same identical commitment to both Mr. Thurston of the Atomic Energy Commission and to the Union representatives that Doctor McCaffree had made in his letter of December 29, 1955 (Exhibit 16).

6) Following the cancellation notice of December 29, 1955 (Exhibit 16) Doctor McCaffree continued to make written proposals to the Unions. One of these was made on January 13, 1956 (Exhibit 13) and another was made on the day of March, 1956 (Exhibit 14). Being unable to dominate the situation, Doctor McCaffree, by his letter of March 8, 1956 (Exhibit 10) attempted to assign "bargaining rights" from Hanford Contractors Negotiating Committee to the Associated General Contractors. This was the letter that "flabbergasted" Mr. Guess (Tr. 381-382).

7) During the same period that Doctor McCaffree was making his proposals a legitimate committee rep-

representing Associated General Contractors of America, Inc., Spokane Chapter, of which Mr. Sam C. Guess was Executive Secretary, was attempting to prevail upon the Union representatives to agree to an addendum or amendment of the contracts effective January 1, 1956, for the express purpose of changing the existing state of affairs respecting isolation pay and bus transportation. These negotiations finally resulted in the "Hanford Project Proposal" of March 10, 1956 (Exhibit 7), which was specifically rejected by the Unions on March 14, 1956, and notice of which rejection was given to the Associated General Contractors at the meeting of March 16, 1956.

If the contracts effective on January 1, 1956, as written, applied to work in the Hanford Area why was Doctor McCaffree and the Committee representing Associated General Contractors during the period from December 15, 1955, to the middle of March, 1956 attempting to get the Unions to agree to amendments?

It will be recalled that Mr. Sam C. Guess, as Executive Secretary of Associated General Contractors of America, Inc., Spokane Chapter, executed the two labor contracts which the appellee claims were breached by the Unions. Mr. Guess' evidence as a witness for the appellee is a complete answer to the appellee's contention that the two contracts as written were applicable, or were intended to be applicable to the Hanford Area.

On his direct examination by counsel for appellee Mr. Guess testified that in the early part of January, 1956, after the two contracts in question had become effective, the Contractors' representatives indicated to

the Union representatives, and particularly to Mr. Sewell Davis of the Teamsters, that they were prepared to sit down and talk about hardship cases and that the proposals made to the Unions would have meant a modification of Exhibits 2 and 3. Those proposals were definitely turned down by the Unions at a meeting on March 16, 1956 (Tr. 326-333).

Later and on cross-examination by counsel for Operating Engineers Local 370 Mr. Guess was even more specific. His attention was called to Exhibit 7 (the Hanford Project Proposal of March 10, 1956). Mr. Guess said it was a copy of a proposal finally drafted and submitted to the Operating Engineers and Teamsters; that it was intended as an addendum to the existing A.G.C. agreements (Tr. 366-367). If there is any doubt as to what Mr. Guess meant by an addendum that doubt is dissipated by his later statement appearing where, in answer to a question concerning Exhibit 7, he said "This was going to be an amendment to the A.G.C. Agreement." (Tr. 386)

Again, on re-direct examination by appellee's counsel, Mr. Guess said:

"We offered in the instance of the Hanford Agreement to make an addendum to the A.G.C. agreement. * * * It was an addendum—it was to be an addendum to the A.G.C. agreements. * * * We were attempting to arrive at some method or some machinery by which the labor harmony could be reached at Hanford. It was our intention and our express purpose and our expression in writing to those unions to make this machinery or the clauses under which we would operate a part of an

addendum to the normal A.G.C. agreement.” (Tr. 394)

During the cross-examination of Mr. Guess an argument arose between counsel for the appellee and counsel for Operating Engineers Local 370. Appellee's counsel then made the novel argument that, in spite of the positive evidence of his own witness, the two contracts between Associated General Contractors and the two appellant Unions (Exhibits 2 and 3), as written, must have become applicable to the Hanford Area because, as he claimed, the Hanford Works Agreement of September 29, 1952 (Exhibit 6) had been cancelled by Doctor McCaffree's letter of December 29, 1955 (Exhibit 16). Hence appellee's counsel argued that if the two labor contracts (Exhibits 2 and 3) did not automatically become applicable to the Hanford Area there would be no written contract to support appellee's claim for damage. This perverted logic has a Latin name but for the moment we have forgotten what it is.

Specification of Error VI requires but little argument.

If the documentary evidence, supplemented by the oral evidence of Mr. Guess, is not sufficient to demonstrate the complete lack of merit in appellee's claim, then clearly under the authorities cited above and in Appendix III it was reversible error to deny appellants' offer to prove that when the two contracts were being negotiated it was specifically agreed that construction work within the Hanford Area was not within the scope of the negotiation.

Mr. Dewey Murrow was Chairman of the Committee

negotiating the contract executed on December 24, 1955 (Exhibit 3) between Associated General Contractors of America, Inc., Spokane Chapter, and Operating Engineers Local 370 (Tr. 354). When Mr. Guess was on the stand as a witness for the appellee counsel for Operating Engineers undertook to prove by him that on November 3, 1955, when that contract was in the process of negotiation, Mr. Murrow stated specifically that they were not then negotiating concerning work within the Hanford Atomic Energy Project. An objection was interposed by appellee's counsel and sustained (Tr. 391). Later, during the presentation of the appellants' case, when counsel for Operating Engineers Local 370 was examining Mr. Arthur A. Rossman, Business Manager of that Local Union, an offer was made to prove that during these negotiations, and specifically on November 3, 1955, Mr. Murrow stated that they were not negotiating in respect of the Atomic Energy Project because the Hanford Works Agreement of September 25, 1952 (Plaintiff's Exhibit 6) was then in effect and covered that area. An objection to this offer of proof was sustained (Tr. 694-695).

If this case is not dismissed by this Court for the reasons already urged, it must be reversed for refusal to permit the proof so offered. Under the authorities cited above and supplemented by the authorities cited in Appendix III, that offered proof was material and vital.

ARGUMENT OF POINT III A**Morrison-Knudsen Company, Inc., Not a Party to Either
of the Labor Contracts Involved**

The appellee sues for the alleged breaches of two distinct contracts. One (Exhibit 2) is a contract executed on December 19, 1955, between Associated General Contractors of America, Spokane Chapter, and Teamsters Local 839. The other (Exhibit 3) is a contract dated December 24, 1955, between Associated General Contractors, Spokane Chapter, and Operating Engineers Local 370. The appellee Morrison-Knudsen Company, Inc., executed neither of these contracts and, so far as the evidence goes, it never agreed to be bound by either. True, it had become a member of Associated General Contractors sometime in February of 1955, before the contracts were executed later in that year, but there is no evidence disclosing what rights mere membership in the Association conferred or what obligations mere membership entailed.

Ketcher v. Sheet Metal Workers, 115 F.Supp. 802, is authority for the proposition that the appellee, not having executed either of the contracts, lacks the right to claim damage for their breach. This is a decision of the United States District Court, Eastern District of Arkansas, decided October 14, 1953. It arose out of a labor contract between an association of employers similar to Associated General Contractors and a sheet metal workers union. The plaintiff Ketcher was a member of the employers' association. The contract was executed only by the association and not by Ketcher, that is to say, Ketcher in that case was in exactly the same

position as the appellee is in this case. The complaint set out two causes of action.

The first cause of action was against the union for its alleged breach of contract in failing to furnish workmen requested by the employer.

The second cause of action was against the union and other employers — competitors of Ketcher — for conspiracy, it being claimed that the other employers conspired with the union to deny the plaintiff the workmen he required.

On the first cause of action jurisdiction was invoked solely under the Taft-Hartley Law, being the same provision of that Act which the appellee invokes in this case. That first count was dismissed for the sole reason that Ketcher, not having executed the contract, could not maintain an action for its breach.

The second cause of action, a tort action for conspiracy under Arkansas law, was sustained, not under the Taft-Hartley Law, but solely because its allegations were sufficient to invoke Federal jurisdiction on the ground of diversity of citizenship.

The trial judge in this case, when ruling on appellants' objection, only expressed the view that in the absence of an appellate court decision he was not necessarily bound by the decision of another district judge (Tr. 441-442), and with that we, of course, agree.

When the two contracts were offered in evidence the court admitted them, over objection, saying that proof of membership in the Association was sufficient to justify the admission of the contracts as exhibits, but spe-

cifically stating that eventually there should be more proof in the record in view of the objection. The court at that time said:

“I would feel more comfortable if you (appellee’s counsel) had more proof on it which, I understood, that you were going to produce by other witnesses.” (Tr. 201-202)

No proof was produced beyond the bare fact that in February, 1955, the appellee had become a member of the Association. It is not necessary for us to insist that under no circumstances can a member of an employers association maintain an action founded on a contract executed only by the association, although that is what the *Ketcher* case holds. If the appellee had produced some additional evidence, such as the trial judge suggested, possibly the objection based upon the *Ketcher* decision would have been eliminated, but no proof of anything more than bare membership was produced. If, for instance, by Mr. Sam C. Guess, Executive Secretary of Associated General Contractors, the appellee, had proved by the by-laws of the Association, or otherwise, what are the rights and the obligations incident to membership a different situation might be presented. The fact of the matter is Mr. Lee J. Knack, the appellee’s Labor Relations Director, testified at some length and at various places in the record that when the appellee became a member of the Associated General Contractors in February, 1955, the Chief Joseph Dam then under construction by the appellee was expressly excluded from the coverage of the then existing contract between Associated General Contractors and the unions affiliated with the Pasco-Kennewick Building Trades Council

(Tr. 197-198, 207). Thus it appears that the appellee now insists upon claiming the benefits of a union contract if it serves its purpose, but otherwise is free to escape its obligations.

It may be that this Court will not find it necessary to decide this particular question because other questions already argued, and remaining to be argued, are decisive whether the *Ketcher* case is right or wrong.

ARGUMENT OF POINT III-B

Concerning Appellee's Commitment at the Pre-Job Conference of January 5, 1956, to Continue Existing Working Conditions Under Hanford Works Agreement

As has several times been stated, Doctor McCaffree on September 21, 1955, nearly a year after he had ceased to be Executive Secretary of Hanford Contractors Negotiating Committee, started an agitation to eliminate isolation pay and bus transportation. This was two months before the contract between the appellee and the Atomic Energy Commission was executed on November 25, 1955 (Exhibit 1). That contract provided for the construction of additional facilities to cost the Atomic Energy Commission in excess of \$1,800,000.00, and work was commenced on November 28, 1955, while the Hanford Works Agreement was still in effect. The appellee agreed to observe the provisions of the Hanford Works Agreement so long as it remained in force. Some preliminary work, including some excavation, was already done before the pre-job conference of January 5, 1956 (Reed, Tr. 404). After the contract between appellee and the Atomic Energy Commission had been executed and after the work had been com-

menced Doctor McCaffree on Decembr 29, 1955, wrote the letter by which he attempted to conditionally cancel the existing Hanford Works Agreement, but in that letter he stated that existing conditions would be maintained until a new agreement could be reached (Exhibit 16). Repeatedly throughout the liability hearing counsel for the appellee insisted that Doctor McCaffree did not have any authority to speak for or bind the appellee Morrison-Knudsen (Tr. 229, 260, 492, 729).

The appellants do not claim that Doctor McCaffree did have any authority to speak for or bind the appellee. The fact seems to be that, taking Doctor McCaffree's word for it as appellee's witness on rebuttal, he had no authority to speak for anyone other than himself, and he had no interest in the matter. However that may be, his intrusion had created a delicate situation. It can be readily understood why Mr. Thurston of the Atomic Energy Commission was gravely concerned about the possibility that this major construction program might be interrupted because of the activities of Doctor McCaffree. For that reason he requested Mr. Lee J. Knack, the appellee's Labor Relations Director, and Mr. Ramon E. Reed, its Project Manager, to be present at the conference at Richland on the morning of January 5, 1956. Following that Richland meeting the customary pre-job conference was held at Pasco that afternoon between Mr. Knack and Mr. Reed, representing the appellee, and Mr. Knapp and others, representing the interested unions affiliated with the Pasco-Kennewick Building Trades Council. At that meeting Mr. Knack definitely agreed that the appellee would

continue the payment of isolation pay and the furnishing of bus transportation, as it had been doing since it commenced the performance of its contract on November 28, 1955. Mr. Knack admits that he made this commitment not only to the representatives of the Unions then present, but also to Mr. Thurston of the Atomic Energy Commission. In Appendix IV we have set out a full abstract of all the evidence concerning the commitment, which Mr. Knack admits he did make at that pre-job conference.

Without repeating all the detailed evidence which appears in the appendix, it will be sufficient now to quote one short excerpt from Mr. Knack's cross-examination by counsel for Operating Engineers Local 370:

“Q. Yes, you say now that what you told them was you were not going to discontinue the isolation pay and you were not going to discontinue the bus transportation?

A. That is correct.

Q. Well, did you say, did you qualify that and say ‘Now’ or ‘Until the end of this job’ or ‘Half-way through this job?’ How did you qualify that, if you did qualify it?

A. **I didn’t qualify it.”** (Tr. 714-715)

Later, on cross-examination by counsel for Teamsters Local 839, Mr. Knack said:

“Q. Well, isn’t that, in substance, what you meant when this morning you said you didn’t want to be used as a wedge, when last Monday or a week ago Monday you said you didn’t want to get ‘in the

bite of the line?' Isn't that, in substance, what you meant?

A. Well, in substance, what I meant, sir, was that I didn't want to be—our company to be the people who were going to lead the way and be put in a position—as a newcomer to the work, we had not been involved in these things in the past, our position was somewhat different from other contractors, substantially different, as a matter of fact, and that I didn't want my company being the company that was going to be the party to come into that area and cause conditions, either to the area or to ourselves—

Q. That is, you didn't want to disrupt a working arrangement that had been in existence for some considerable time?

A. At the particular time, in view of the conversations that I had had with Mr. Thurston, I felt that it was expedient for our company, even though the request had been unofficial, under the circumstances, to abide by that request." (Tr. 722-723)

In conformity with that commitment of Mr. Knack, isolation pay and bus transportation were continued, but on the morning of March 22, 1956, the work stoppage occurred, because, and only because, the appellee violated its commitment and then failed to make the necessary buses available at the North Richland entrance to the barricaded area. The ensuing work stoppage was not a strike by the Unions. It was a lockout by the employer.

In the light of Mr. Knack's unqualified admissions, appellee's counsel, in proposing findings of fact at the conclusion of the liability hearing, could not and did

not ask the court to find that this commitment was not made. Those findings only say that the Knack commitment was not made “as a contractual commitment” (Tr. 136, Finding VIII).

The appellants do not claim that the commitment became binding on appellee because originally made by Doctor McCaffree on December 29, 1955. It became binding upon the appellee because with full knowledge of it and the conditions resulting from it Mr. Knack, who did have authority, adopted it, ratified it and on January 5, 1956, made it his own. It is not important whether Mr. Knack’s commitment is called a “contractual commitment” or a “waiver” or an “estoppel.” It was formally made to the representative of the Atomic Energy Commission as well as to the representatives of the Unions, and it is futile for the appellee to now claim that it was not to be taken seriously.

In *Texas v. Florida*, 306 U.S. 398, page 425, 83 L.ed. 817, page 835, Mr. Justice Stone, concisely stated a self-evident, legal truth in these words:

“When one intends the facts to which the law attaches consequences, he must abide the consequences whether intended or not.”

One more, and a final, reference to Doctor McCaffree may be warranted. He was called as a rebuttal witness by the appellee and on cross-examination by counsel for Operating Engineers Local 370 (Tr. 733) was being questioned as to his activities subsequent to September, 1955—a year after he had ceased to be Executive Secretary of the Hanford Contractors Negotiating Committee but was still continuing to write letters on

its letterhead and signing those letters as its Executive Secretary. He was asked if in his negotiations with the Operating Engineers Local 370 and Teamsters Local 839 he disclosed to them the facts relative to his authority to speak for that Committee or any of its members, and to that inquiry he made the flippant answer "I was asked for none" (Tr. 735, 746). That brand of business ethics may be permissible—or even commendable—in a Doctor of Philosophy, but if practiced by a less cultured business agent of a labor union he would probably be inviting congressional investigation.

We do not wish to be understood as imputing to appellee's counsel any responsibility for the delinquencies of Doctor McCaffree, if they were delinquencies. On the contrary, we think counsel are entitled to much credit for disclosing the real facts when they produced Doctor McCaffree as their rebuttal witness.

ARGUMENT ON POINT IV

Joint and Several Liability

The judgment entered on April 14, 1958 (Tr. 144-148) provides that the appellee have judgment against the two Local Unions "jointly and severally" in the amount of \$147,284.41, with interest and costs.

The appellants requested findings as provided by Rule 52-B of the Rules of Civil Procedure which findings appear in the Transcript of Record, Vol. 1, pp. 149-168. In addition to the request for proposed findings, appellants moved that the judgment entered on April 14, 1958, be altered and amended (Tr. 170) by striking therefrom the provision that the appellee have judgment against the appellants *jointly and severally*

for the reason that the evidence failed to establish any joint liability in the amount stated, or in any amount whatsoever. When this motion to amend the judgment was presented to the trial court on May 8, 1958, counsel for the appellee, by plain implication if not by express statement, agreed that the judgment as originally entered would have to be amended and thereupon drafted an amendatory order which the trial judge entered on that date (Tr. 171-174).

Two separate and distinct contracts are involved:

(1) A contract between Associated General Contractors and Teamsters Local 839, dated December 19, 1955 (Exhibit 2). The Engineers Local 370 is not a party to that contract.

(2) A contract between Associated General Contractors and Engineers Local 370, dated December 24, 1955 (Exhibit 3). Teamsters Local 839 is not a party to that contract.

The appellee, Morrison-Knudsen Company, Inc., is not named as a party to either of these contracts and the evidence fails to establish that at any time before the work stoppage occurred on March 22, 1956, it ever agreed to be bound by either of the contracts for the alleged breach of which it is now claiming damages. For the present purposes it may be assumed that the appellee might have maintained an action on one or the other or both contracts because, and only because, it claims it was a member of the Associated General Contractors at the time the contracts were negotiated in December, 1955. Whether or not mere membership in Associated General Contractors without more makes the appellee

a beneficiary of the contracts is not material to the present question.

If it were not for Rule 20-a of Federal Rules of Civil Procedure the attempt to sue the two Locals on different contracts in one action would have amounted to a fatal misjoinder of both parties and causes of action. In the absence of that rule the appellee would have been required to bring one action against Teamsters Local 839 and another separate and distinct action against Enugineers Local 370. This is so because Engineers Local 370 could not be sued for breach of the Teamsters' contract, and likewise Teamsters Local 839 could not be sued for breach of the Engineers' contract. If two separate actions had been brought, one by the appellee against Teamsters Local 839 and the other by the appellee against Engineers Local 370 the trial court, in its discretion, as a matter of convenience, might have tried both actions together, but at the conclusion of the evidence separate and several judgments against each would have been required. There could not be one joint and several judgment against both.

“Plaintiffs who sue as joint contractors must show a joint interest in the same subject. *And if two or more are sued jointly, plaintiff has the burden of showing a joint substantial liability on the part of all defendants* * * * 13 C.J., p. 761, Sec. 949, Title “Contracts.”

“In the absence of a statute providing otherwise, where the promises are several in respect of the promisees, they must sue separately and cannot sue jointly, * * *.” 17 C.J.S., p. 808, Sec. 352, Title “Contracts.”

“At common law, persons liable on separate and distinct contracts may not be joined as defendants in one action; several persons bound by the same contract may be sued jointly if they are bound jointly, but not if they are only severally bound; if several persons are bound by a contract jointly and severally, plaintiff may at his election sue one or all of such persons but not an intermediate number.

*“Persons liable on several and distinct contracts or obligations, although with the same person or set of persons, may not be joined as defendants in one action at common law, but each must be sued separately; * * **

*“Where a contract entered into by several obligors is so framed that they are bound severally only, each obligor being responsible only for his own acts or obligations, they may not be sued jointly at common law, but the action must be against each obligor separately. * * **” 67 C.J.S., p. 949, Sec. 35, Title “Parties.”

*“Persons who are bound severally are separately liable, and their obligations may and must be enforced separately in the absence of a statute to the contrary. * * **” 20 Am. Jur., p. 816, Sec. 269.

“The circumstance that promises are contained in separate instruments though in identical terms shows the promises to be several.” Williston on Contracts, Vol. 2, Sec. 323, p. 940.

The joinder of the two Local Unions in a single action was permissible because, and only because, Rule 20-A, Federal Rules of Civil Procedure, provides that several parties may be joined as defendants “if any question of law or fact common to all of them will arise in the action,” but that rule further provides for judg-

ment “against one or more defendants according to their respective liabilities.” Rule 20-A is one of procedure only. It does not create any substantive rights or liabilities that would not exist in its absence.

In *Lansburgs & Bro., Inc. v. Clark*, 127 F.(2d) 331 (a decision by the United States Court of Appeals of the District of Columbia), the court at page 333 said concerning this very rule:

“We are of opinion that the bringing of a single joint action under the new rules does not affect the respective rights of the parties. At common law, the two causes of action could not have been joined. That they now may be, does not change the result. *The causes remain as separate and distinct as if commenced separately.* Rule 20 neither has, nor was intended to have, any effect on the substantive rights of the parties, and itself states that judgment may be given ‘for one or more of the plaintiffs according to their respective rights of relief.’ Obviously, therefore, it is simply a procedural rule, the sole purpose of which is to remove the procedural obstacles of the common law.”

Lansburgh v. Clark was followed in *Gallagher v. Merritt, etc.*, 86 F.Supp. 10, the court saying, p. 13:

“It is stated therein that Rule 20 neither has nor was intended to have any effect on the *substantive rights* of the parties, and that obviously it is simply a procedural rule, the sole purpose of which is to remove the procedural obstacles of the common law.” (Italics by the court)

What the situation might be had the appellee elected to bring some appropriate action in tort against both defendants is beside the question. Appellee having elected to sue for alleged breaches of two separate con-

tracts *substantive contract law* applies. The liability of these two appellants, whatever else it may be, is not joint and several.

If the judgment as originally entered on April 14, 1958 (Tr. 144-148) is compared with the amendatory order of May 8, 1958 (Tr. 171-174) it is perfectly apparent that no substantial change was effected. The original judgment states that the appellee shall have judgment against the two appellants jointly and severally. The amendatory order of May 8, 1958, eliminated the expression "jointly and severally" and then, after reciting that the appellee shall recover the stated sum, states that:

"It Is Further Ordered that the satisfaction of said judgment against either defendant shall automatically operate as a pro tanto satisfaction of the judgment against the other defendant, to the end that plaintiff shall in no event collect from said defendants either individually or jointly, more than the total amount of the judgment, interest, and costs as aforesaid."

It will thus be seen that the amendatory order accomplishes exactly nothing. It merely removes the "joint and several" label of the original judgment and in other words provides for what is in fact a joint and several judgment. The label has been removed but the substance remains exactly as it was before. Again it should be emphasized that jurisdiction in this action was invoked solely under Section 301 of the Labor Management Relations Act of 1947, otherwise known as 29 U.S.C.A. Section 185, quoted *supra*, page 2, which specifically limits the jurisdiction of the District

Court in this class of cases to suits for violation of contracts. It was because of that restricted jurisdiction of the District Court that the appellee's counsel were compelled to acquiesce in the dismissal of Teamsters Joint Council 28 and Western Conference of Teamsters.

There is no evidence in the record by which this Court can now assess damages as between Teamsters Local 839 and Operating Engineers Local 370, according to their respective liabilities. For that reason, if for no other reason, this action must be dismissed.

ARGUMENT OF POINT III-C

The Appellee Violated the Very Provisions of the Two Labor Contracts Which It Claims Were Breached by Appellants

It may be unnecessary to reiterate that the appellants do not admit that either the Teamsters' contract dated December 19, 1955 (Exhibit 2) or the Engineers' contract dated December 24, 1955 (Exhibit 3) has any application to the appellee's work in the Hanford Area. For the purposes of argument only we will assume that those contracts, as written, were applicable to that work.

The sole basis of appellee's action for damage is that the Unions violated two provisions of those contracts, which we now quote again:

“ARTICLE VIII—NO STRIKE—NO LOCKOUT.

“It is mutually agreed that there shall be no strikes, lockouts, or other slowdowns or cessations of work authorized by either party on account of any labor differences pending the full utilization of the grievance machinery set up in Article X * * *.”

“ARTICLE X — SETTLEMENT OF DISPUTES AND GRIEVANCES

“Section 1. If a dispute involving the application or interpretation of the Agreement shall arise (other than jurisdictional disputes), written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either **EMPLOYER** or the **UNION**) to the other. If the two parties are unable to adjust the same within forty-eight (48) hours, the dispute shall be settled by the following procedure. * * * ” (Emphasis in the contract itself).

These quotations are from the Operating Engineers' contract (Exhibit 3). The same provisions, in identical language, appear as Articles VII and IX in the Teamsters' contract (Exhibit 2).

As already has been shown, the Associated General Contractors, by its “Hanford Project Proposal,” dated March 10, 1956 (Exhibit 7) sought to prevail upon the Unions to agree to amendments to make the contracts applicable to the Hanford Area. This proposal was rejected by both Unions on March 14, 1956. That rejection was communicated to the Associated General Contractors of America, Inc., at the meeting of March 16, 1956. Following that rejection the appellee summarily took matters into his own hands and refused to continue the customary bus service. The work stoppage then ensued. That work stoppage was not a strike by the Unions prohibited by the contracts. It was a prohibited lockout by the Employer.

Again assuming, for the purposes of argument only, that the contracts were applicable to the Hanford Area,

if the Unions violated their contracts when on March 16, 1956, they definitely and unqualifiedly refused to recognize their contractual obligations to the appellee, as a member of the Associated General Contractors, then the quoted article of the contracts relative to the settlement of disputes and grievances came into play. At that time it was then imperative that the appellee, as the employer and the offended party, *give written notice of a demand for arbitration and in no event later than ten days*. There is not the slightest suggestion of evidence that the appellee complied with that provision of the contracts.

As stated by Mr. Reed, appellee's Project Manager, the job was not picketed until April 5, 1956—thirteen days after the appellee had ceased to furnish the customary bus service (Tr. 409).

In stating that there was no compliance on the part of the appellee with the provision of the contracts requiring written demand for arbitration within the limited ten-day period, we are not overlooking the statement made by Mr. Sam C. Guess when, as a witness for the appellee, he was testifying concerning the meeting of March 16, 1956, and said that "we (the contractors) offered to arbitrate" (Tr. 333). When read in context, it is perfectly apparent that what Mr. Guess was then talking about was mediation and not arbitration. The two terms "arbitration" and "mediation" are frequently and properly used interchangeably. At other times they have distinct meanings. In the vernacular of labor relations (or jargon—if that be a better word) arbitration is a process of calling in some third party to settle a

dispute which has arisen under an admittedly existing contract. Mediation means calling in some third party to assist negotiators in agreeing upon the terms of a contract not yet executed. The matter being considered by the parties on March 16, 1956, to which Mr. Guess was referring, was the contractors' proposal (Exhibit 7) to amend the existing contracts. The contracts as written required both parties to submit disputes to arbitration. Neither party was obligated to invoke mediation as a means of arriving at a contract or an amendment to a contract not yet executed. That this is the sense in which Mr. Guess used the word "arbitration" is evident from the fact that appellee's counsel himself referred to this very matter as "some offer to arbitrate or mediate this matter of the dispute" (Tr. 396).

We will not burden the Court with citation of authorities to the effect that when a party sues for a breach of contract the complaining party must allege and prove that it performed the contract on its part, or at least was willing to perform if not prevented by the other party. Under the liberal rules of pleading now prevailing in the Federal courts the absence of an allegation of performance perhaps is not vital, but proof of performance is, nevertheless, imperative as a condition to the recovery of claimed damage for breach of contract.

SPECIFICATIONS OF ERROR VII, VIII AND IX

These specifications are merely formal and require no further argument.

The findings and conclusions proposed by the appellee on the liability issue and adopted by the trial court

(Tr. 123) completely ignore the undisputed oral and documentary evidence already described.

The findings and conclusions on liability proposed by the appellants (Tr. 149) were rejected by the trial court only because to enter any of them would compel a judgment of dismissal (Tr. 168-169).

ARGUMENT ON POINT V CONCERNING THE DAMAGE AWARD

The original contract price for the two main areas, where the work was to be performed by plaintiff for the Atomic Energy Commission, was \$1,777,180.00. This sum was the total of Area 100-F \$908,380.00, and Area 100-H \$868,000.00 (referred to hereafter as F and H). The contract price for those areas and three other lump sum items which comprised all of the work to be performed was \$1,869,580.00 (Tr. 878-881). The contract sued upon involved the construction of pumping plants, and the two structures involved were basically concrete construction (Tr. 876-877). The plaintiff's bid was a lump sum bid that included the profit expected to be made (Tr. 791, 802, 946, 1100, 1116-1118). The plaintiff, regardless of the work stoppage or claimed breaches of contract by the defendants, would have sustained loss on the contract (Tr. 947, 948), though the bid lump price included the profit mark-up. No money penalties were imposed against the plaintiff because of delay (Tr. 790), and though plaintiff claimed "increased costs" by reason of delay, profits were allowed in addition thereto, and entered as part of the judgment (Tr. 1144-1145, 142-143, 148).

By reason of denial of liability, all items of claimed damage are resisted. Argument here will be directed to four of the items set out under Point V as follows, which defendants, in any event, contend are excessive and not supported by the evidence:

ITEM 8. Equipment rental claimed in the amount of \$27,043.13 and allowed in the amount of \$18,938.82.

ITEM 12. General administrative expense claimed in the amount of \$19,257.00, and allowed in the amount of \$17,331.30.

ITEM 16. Efficiency loss for labor and supplies claimed in the amount of \$89,370.98 and allowed in the amount of \$75,933.89.

ITEM 11. Loss of profits claimed in the amount of \$16,592.34 and allowed in the amount of \$5,936.29 (Tr. 142-143, 1157-1158), discussed under subsection (A) following.

(A) Equipment rental in the amount of \$18,938.82 was allowed in Item 8, to which a mark-up of 10% profit was added (Tr. 1145, 142, 143, 148). Plaintiff contended that regardless of actual costs charged by plaintiff for equipment used on this particular job at Hanford, it was entitled to an additional award for fair rental value of the equipment. Defendant contends that plaintiff is entitled only to rentals charged by the principal office of plaintiff at Boise, Idaho, and carried as charges to the instant contract. The court, though expressing doubts about plaintiff's position (Tr. 836-839), made an allowance for rental in an amount exceeding double the charges actually made to the contract (Deft. Ex. 56, p. 5; Tr. 1061-1066).

The amount allowed by the court was excessive in the sum of \$11,695.91, that amount being the excess of rentals allowed over the charges made to the contract, plus 10% of the total allowance for profit (Tr. 142, Item 8 plus 10% of said item, minus \$9,136.79 actual charge—see Ex. 56).

Because the contract was a lump sum contract including the profit, the allowance of the excess charge was not compensatory but was in fact a further duplication of profit (Tr. 802). The allowance was excessive, and based wholly on a conjectural basis. The logical and only reasonable inference to be drawn from the facts is that profit for the use of the machinery was included in the bid. Thus if company rental charges are compensated as the measure of loss, allowance as to further and additional profits is excessive, and wholly speculative.

There is a double duplication here, because further profit in addition to costs was allowed on a contract, which was bid with a profit margin included. Rental value of the machinery is allowed in addition to the fixed profit in the contract *plus* a further profit of 10% on the rental value.

The applicable rule is stated in 15 Am. Jur., Damages, p. 547 last paragraph Section 137:

“In some jurisdictions, recovery cannot be had both for loss of profits, assuming that such damages are recoverable, and for expenditures, since, it is said, this involves a double recovery.”

This matter was touched upon rather obliquely in *Lloyd v. American Can Co.*, 128 Wash. 298, 309, 222 Pac. 876:

“Reasonable compensation is the measure of damages for the wrongful breach of a contract. Some of the authorities hold that a plaintiff may not recover both loss of profits and expenses incurred in preparing to perform the contract, because a duplication of recovery would result. We are not troubled with that question here because the respondent did not seek to recover any loss of profits.”

However, when the Washington Supreme Court did face the question of duplication of recovery in *Platts v. Arney*, 50 Wn.(2d) 42, 47 (1957), 309 P.(2d) 372, it said:

“However, where the plaintiff sues for his loss of profit, he cannot recover *in addition* to this the expenditures which he would have had to make in any event to carry out his own promises under the contract. See annotation: 17 A.L.R.(2d) 1300, Section 8.”

What has been said above applies equally to Item 11, where an award of lost profits was allowed in the sum of \$5,936.29, being the total of 10% profit allowed on Items 1, 2, 8, 10, 12, 15, 17 (Tr. 143).

Both accountant witnesses for defendants denied profit allowances for the same reason (Tr. 1100, 1116, 1117). It being definite, that plaintiff would not have made any profit, none should have been allowed. 15 Am. Jur. page 558, Section 150.

(B) Item 12 was an allowance (Tr. 947, 948) for general administrative expense in the sum of \$17,331.30. The manner of computing the general administrative expense is set out in the Transcript at pages 816 and 1023. Apparently plaintiff was offering alternate

methods of computation (Tr. 1024). The first calculation in the words of plaintiff's witness Reed was:

"We have taken for April the number of days in April and the original scheduled revenue for that month and the same with May and June, and then added the total (1137) number of days for those three months and the 91 days the original scheduled revenue was \$702,380. The actual revenue which was the only month that we received revenue, was \$104,972, and the net short was the difference between the 702 and the 104, or \$597,608. And then that divided by the 91 days in the three months gives us a net revenue short per day of \$6,550, and then the revenue, administrative expense revenue short for the period of 98 days was multiplied by 3%, which is the percentage the job is charged for general administrative expense, which amounts to \$19,257." (Tr. 816)

The second method of calculation, according to plaintiff's witness Madsen, was as follows:

"Q. (By MR. DEGARMO): I am handing you Plaintiff's Exhibit 53 for identification, will you state what it is? (hands paper to witness)
(Testimony of R. H. Madsen)

A. General administrative expense, and it is a recalculation of the previous one and it is based on an average daily scheduled revenue over the full period of the 285 days in 100-F and 315 days in 100-H.

Q. Were those the number of days which were the originally scheduled time for completion of this contract?

A. Yes, sir.

Q. And the number of days which are shown on the graphs, Plaintiff's Exhibits 21 and 22?

A. That is correct.

Q. And when you used that alternative method of computation, what did you find was the daily average as compared with Plaintiff's Exhibit 30?

A. The new calculation shows an average daily of \$5,944, compared with \$6,550 used in the previous calculation (1446).

Q. And using the same method of calculation, that is, the 98 days times the average amount, plus or times the 3%, what do you arrive at?

A. \$17,475." (Tr. 1022-1023)

It can be seen from the above that plaintiff produced its claimed loss figure from mathematical calculations bottomed on an average daily scheduled revenue, but bitterly complained about defendants' auditors determining their computations from actual average revenue received (Tr. 1103-1109). Defendant contends that plaintiff's claimed Item 12 is based on the same faulty kind of mathematical calculation as was its original claimed Item 11 (Tr. 42-43). Plaintiff produced no records of expenses or accounting entries and based its claim wholly on a projected revenue calculation not supported in fact, or by plaintiff's performance up until the date of the work stoppage when it was about \$227,000 behind its projected revenue schedule (Tr. 850). The reasonable inference here would be that the percentage of 3% charged on the average daily projected and scheduled revenue is a percentage of a hope or guess and wholly speculative, for the record clearly shows that the actual revenue on the day of the work stoppage was 36% behind schedule. It is definite that in

March, 1956, the projection of plaintiff was wholly in error, and certainly such a calculation cannot stand.

(C) This argument shall be directed to Item 16, where the court made an allowance, and entered judgment for \$75,933.89, (Tr. 142, 148) upon claim for \$89,370.98. As to this item, plaintiff's claim has fluctuated between the amount of \$55,280.00 originally claimed in itemization of Bill of Particulars of plaintiff's amended complaint (Tr. 36) and the amended damage claim in trial amendment of \$92,835.29 (Tr. 37, 44-46, 48).

Though the former tendency of the courts was to restrict recovery to such matters as were susceptible of having attached to them an exact pecuniary value, it is now generally held that the uncertainty referred to is uncertainty as to the fact of damage, and not as to its amount. Thus the rule is accepted that, where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude a recovery.

However, the plaintiff must still produce the best and most reasonable evidence available; he must produce the best and most reasonable computation under the circumstances of the case. If defendant produces the best and most reasonable evidence and computation, an allowance of damages to plaintiff, grossly in excess of the substantial damages determined under defendants' best and most reasonable evidence and computation will be deemed to be excessive. The law does not in this case allow a premium to plaintiff by way of punitive damages.

Defendants' tabulations of excess labor costs were computed on the same basis as plaintiff's Bill of Par-

ticulars, with wholly different results. We suggest defendants' tabulation is not only accurate, but is the best and most reasonable basis for the damages sustained by plaintiff, assuming defendants' liability.

The concrete work was the major part of plaintiff's project in areas F and H (Tr. 820). Plaintiff, in determining its labor costs prior to the work stoppage, employed a formula in which the number of cubic yards of concrete poured was divided into the labor costs up to the period of March 31st, and the difference between that cost and the cost achieved by the same method of computation over the period from June 6th to September 30th was determined to be the excess cost of labor (Tr. 824), and more fully detailed by plaintiff's witness Nelson (Tr. 925-929).

Plaintiff, in submitting a computation in support of its claim for damages as the result of excess material costs proceeded under a formula which determined (1) the entire cost of the materials used in the pouring in the F and H areas, (2) the sum of money resulting from the number of yards of concrete poured multiplied by the engineer's estimated cost of material, which was \$6.10 per yard in the F area and \$6.49 per yard in the H area (Tr. 826-829, 929-937). Amount No. 2 was then subtracted from amount No. 1 leaving the amount claimed by plaintiff. No acceptable reason was given by plaintiff's witnesses for the increased cost of the materials over the engineer's estimate and plainly no substantial basis exists for the claim (Tr. 937). With a price constant as to materials used, no reasonable basis exists for the excess cost of materials claimed.

Defendant contends, with regard to plaintiff's claim of excess labor costs, that the plaintiff gives no consideration whatsoever to the excess labor costs of the project incurred as a result of an excess pour of concrete over the plaintiff's engineering estimates. Plaintiff's witnesses freely admitted that the concrete pour in the two areas F and H was about 1,050 yards over the engineer's estimated pour, and that no consideration was given to this item in computing claimed excess labor costs (Tr. 852-857). Defendants urge that they are not properly chargeable with excess costs that arise from the substantial amount of additional costs of the excess pour of concrete, which was far beyond the estimates and projection of plaintiff, and they contend that the proper method of determining efficiency loss is to base such determination on the amount of pour remaining after the excess pour cost has been subtracted. Defendants submit that this is a reasonable and proper method of arriving at unit cost per yard and the over-all total of claimed loss. This is particularly an applicable formula here because plaintiff's lump sum bid did not include any excess pour (see explanation and computation, Defendants' Exhibit 56, pp. 10-13).

Plaintiff's claim with respect to excess material costs is built on a premise which is so questionable as to make a computation wholly uncertain as to the fact of damage. Plaintiff has lumped together all of the cost of materials used for the pour and has then come up with an excess cost item by subtracting from that amount the original engineering estimates of costs. There is absolute uncertainty in such a method, and there is no basis

for assuming the correctness of those estimates (Tr. 828-829, 929-937).

The testimony of plaintiff's witness Nelson (Tr. 929-937) plainly indicates the conjectural basis of plaintiff's computation. For instance, the witness indicated that under "supplies" there was so much "stuff" with such considerable "use," such as form materials, lumber, etc., that it could be used over and over again, and that the longer materials were used the less the supply cost would be; that an attempt to estimate the actual cost item as of March 30th wouldn't mean anything (Tr. 934), and that the whole claim of plaintiff is built upon a mathematical process in which the only substantiating factor was pure estimate (see also Defendants' Exhibit 56, p. 13).

The record discloses that plaintiff's estimates are not entitled to be considered as proof of the certainty of the fact of damage, for plaintiff was admittedly wrong in its estimate as to the progress of the work, which by plaintiff's own admission was 18 days behind schedule at the time of the work stoppage in March, and which schedule was 44 days behind so far as plaintiff's revenue projection was concerned (Tr. 847-852, Defendants' Exhibit 56, p. 13). Plaintiff's estimate of the amount of concrete to be used was likewise in error (Tr. 854-855). Plaintiff's bid estimates under the entire lump sum bid on the contract were in error so that plaintiff lost money on the contract, regardless of the extent of its recoveries on contingent claims, in one of which plaintiff was again the erring party (Tr. 861, 947, 948, 1040-1044). Plaintiff's estimates as indicated

in its projection charts (Plaintiff's Exhibits 21 and 22) were also in error. As the court remarked, "I think you can demonstrate, as Bobby Burns said, 'The best laid schemes o' mice and men gang aft a-gley.' As a matter of fact, this resulted in a loss without strike benefits" (Tr. 1009-1010). And see (Tr. 1137-1138).

As the Supreme Court of the State of Washington said in *National School Studios, Inc., v. Superior School Photo Service, Inc., et al.*, 40 Wn.(2d) 263, 275,

"The bare, oral statement by appellant's president that it made 10 per cent profit on the dollar volume of the business obtained by Lien is a mere conclusion. It does not constitute the reasonable certainty of proof which is required under the circumstances shown to exist in this case."

We submit that if damages are awarded under Item 16, the proper amount, assuming liability, would be \$38,209.94 (Defendants' Exhibit 56, pp. 12-13). Thus the total of excess damages awarded plaintiff in the items discussed (Item 11, PROFIT, \$5,936.29; Item 8, EQUIPMENT RENTAL, \$9,802.03; Item 12, ADMINISTRATION EXPENSE, \$17,331.30; Item 16, LABOR AND MATERIALS EFFICIENCY LOSS, \$37,723.95 (derived from \$75,933.89, court award — minus \$38,209.94 defendants' figure) Total \$70,793.57.

CONCLUSION

To be entitled to a judgment in its favor the appellee, as plaintiff, had the burden of proving not one or two but all the five elements of a complete case, namely:

(a) That it was a party to one or the other or both

of the labor contracts that became effective January 1, 1956.

(b) That those contracts were applicable to appellee's work to be done within the limits of the Hanford Atomic Energy Project.

(c) That the appellee performed the contracts on its part and that one or the other or both of the appellants without cause breached them.

(d) That the appellee sustained damage in a total amount established with reasonable certainty; and

(e) The amount of that total damage properly chargeable to each appellant under its separate contract.

The appellee failed to establish any one of these indispensable elements.

On the other hand, the evidence is undisputed that the appellee's work for the Atomic Energy Commission was commenced on November 28, 1955, under the then existing Hanford Works Agreement (Exhibit 6) and was continued until March 22, 1956, under the commitment made by Lee J. Knack, appellee's Director of Labor Relations, on January 5, 1956, to both Mr. Thurston of the Atomic Energy Commission and to the unions affiliated with the Pasco-Kennewick Building Trades Council, including the two appellants.

For these reasons the case must be dismissed in this Court.

In any event, the judgment must be reversed for refusal of the trial court to permit the appellants to prove that when the contracts were in the process of negotiation the representatives of the contractors and of the

unions agreed that they were not dealing with the Hanford Area (Point VI).

Finally, the award of damage made by the trial court is excessive at least to the amount of \$70,793.57.

Respectfully submitted,

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APPENDIX I

EXHIBITS INTRODUCED ON HEARING OF ISSUE OF
LIABILITY

Plaintiff's Exhibits

1:	Contract dated November 25, 1955, between Morrison-Knudsen Company, Inc., and Atomic Energy Commission for the construction of facilities at Hanford Works, Richland, Washington, for the lump sum of \$1,869,580.00.	Identified Tr. 194 Offered Tr. 195 Admitted Tr. 195
2:	Contract dated December 19, 1955, between General Contractors of America, Inc., Spokane Chapter, and five Local Unions of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, including Local 839 of Pasco, Washington.	Identified Tr. 199 Offered Tr. 200 Admitted Tr. 203
3:	Contract dated December 24, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and International Union of Operating Engineers Local No. 370.	Identified Tr. 199 Offered Tr. 200 Admitted Tr. 203

Defendants' Exhibits

4:	Contract dated September 1, 1950, between the Associated General Contractors of America, Inc., Spokane Chapter, and the International Union of Operating Engineers Local No. 370 and five Local Unions of International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America, including Local 839 of Pasco, Washington.	Identified Tr. 217 Offered Tr. 218 Admitted Tr. 220
5:	Letter dated July 17, 1952, offered by defendants and not admitted.	(Tr. 309)

Plaintiff's Exhibit

Pl.	Contract dated September 29, 1952, between	Identified
Ex. 6:	Employer Negotiating Committee and Pasco-Kennewick Building Trades Council and Union Negotiating Committee, accepted by various local unions, including Operating Engineers Local 370 and Teamsters Local 839. This contract became known as "Hanford Works Agreement."	Tr. 317
		Offered
		Tr. 317
		Admitted
		Tr. 317

Defendants' Exhibit

Def.	Document dated March 10, 1956, entitled	Identified
Ex. 7:	"HANFORD PROJECT PROPOSAL" made by Associated General Contractors of America, Inc., Spokane Chapter, to Operating Engineers Local 370 and Teamsters Local 839. Voted on on March 14 by Teamsters and rejected, and also rejected by Operating Engineers.	Tr. 366
		Offered
		Tr. 367
		Admitted
		Tr. 367

Plaintiff's Exhibits

Pl.	Letter dated March 30, 1956, from Sam C.	Identified
Ex. 8:	Guess, Executive Secretary of the Associated General Contractors of America, Inc., to Art Rossman, Operating Engineers Local 370, referring to work stoppage which commenced on the preceding Thursday, March 22, 1956.	Tr. 429
		Offered
		Tr. 431
		Admitted
		Tr. 431
Pl.	Letter dated April 3, 1956, from Arthur A.	Identified
Ex. 9:	Rossman, Business Manager of Operating Engineers Local 370, to Sam C. Guess, Executive Secretary, Associated General Contractors of America, Inc., Spokane Chapter.	Tr. 430
		Offered
		Tr. 431
		Admitted
		Tr. 431

Defendants' Exhibit

Def.	Letter dated March 8, 1956, signed Kenneth	Identified
Ex. 10:	M. McCaffree, Executive Secretary, to Eastern Washington Building Chapter and Associated General Contractors of America, Inc., stating that effective March 9, 1956, bargaining rights held by Hanford Contractors Negotiating Committee are assigned to Associated General Contractors, Inc., Spokane Chapter.	Tr. 546
		Offered
		Tr. 548
		Admitted
		Tr. 548

Plaintiff's Exhibit

Pl.	Calendar for years 1955, 1956 and 1957.	Identified
Ex. 11:		Tr. 593
		Offered
		Tr. 594
		Admitted
		Tr. 594

Defendants' Exhibits

Def.	Letter dated December 15, 1955, on letterhead	Identified
Ex. 12:	of Hanford Contractors Negotiating Committee, signed Kenneth M. McCaffree, Executive Secretary, to International Union of Operating Engineers Local 370 enclosing a proposed memorandum of agreement between Hanford Contractors Negotiating Committee and various local unions affiliated with Pasco-Kennewick Building Trades Council.	Tr. 604
		Offered
		Tr. 604
		Admitted
		Tr. 608
Def.	Letter dated January 13, 1956, on letterhead	Identified
Ex. 13:	of Hanford Contractors Negotiating Committee, signed Kenneth M. McCaffree, Executive Secretary to International Union of Operating Engineers Local No. 370, enclosing a proposed memorandum agreement to make the contract of Operating Engineers Local 370, dated December 24, 1955 (Exhibit 3 above described) applicable to Hanford Project with certain stated exceptions.	Tr. 612
		Offered
		Tr. 624
		Admitted
		Tr. 624

- Def. Document entitled "Memorandum of Agree- Identified
Ex. 14: ment" between International Union of Oper- Tr. 625
ating Engineers Local No. 370 and Hanford
Contractors Negotiating Committee, signed
by three individuals, including Kenneth M. Offered
McCaffree, as Hanford Contractors Negoti- Tr. 625
ating Committee. This Exhibit is dated the
— day of March, 1956. Admitted
Tr. 626
- Def. Letter dated March 2, 1956, on letterhead of Identified
Ex. 15: Hanford Contractors Negotiating Commit- Tr. 656
tee, signed Kenneth M. McCaffree, Execu-
tive Secretary, to International Brotherhood Offered
of Teamsters, Chauffeurs, Warehousemen Tr. 656
and Helpers Local Union 839, relative to
certain proposals as to classifications and Admitted
rate of pay to be applicable to Hanford Area Tr. 657
as of January 1, 1956.
- Def. Letter dated December 29, 1955, on letter-
Ex. 16: head of Hanford Contractors Negotiating
Committee, signed Kenneth M. McCaffree,
Executive Secretary to International Broth-
erhood of Teamsters, Chauffeurs, Ware-
housemen and Helpers Local 839 and Pasco- Identified
Kennewick Building and Construction Tr. 657
Trades Council and other Locals signatory
to the construction collective bargaining
agreement Hanford Works, stating that
Hanford Contractors Negotiating Commit-
tee is exercising the right to terminate the Offered
Hanford Works agreement as of December Tr. 657
31, 1955, but stating that the Hanford Con-
tractors will not stop work on the project as
of January 1, 1956, but will maintain wages
and conditions in effect on December 31,
1955, until a new agreement can be com- Admitted
pleted and that the wage policy will remain Tr. 658

unchanged, etc. The letter proposes a meeting to be held on January 5, 1956, at Richland.

Plaintiff's Exhibits

- | | | |
|---------|--|------------|
| Pl. | Contract dated February 13, 1956, between | Identified |
| Ex. 17: | Atomic Energy Commission and Richland School District 400, providing for payments to be made by the Commission to the School District for the maintenance of District Schools for the school year 1955-1956. | Tr. 767 |
| | | Offered |
| | | Tr. 767 |
| | | Admitted |
| | | Tr. 767 |
| Pl. | Contract dated February 16, 1955, between | Identified |
| Ex. 18: | Atomic Energy Commission and Richland School District 400, providing for payments to be made by the Commission to the School District for the maintenance of District Schools for the school year 1954-1955. | Tr. 767 |
| | | Offered |
| | | Tr. 767 |
| | | Admitted |
| | | Tr. 767 |
| Pl. | Ordinance dated November 30, 1950, regulating traffic in Hanford Area with amendments dated June 6, 1955. | Identified |
| Ex. 19: | | Tr. 767 |
| | | Offered |
| | | Tr. 767 |
| | | Admitted |
| | | Tr. 768 |
| Pl. | Five letters dated May 26, 1943; November | Identified |
| Ex. 20: | 8, 1943; January 4, 1944; August 16, 1944, and July 31, 1945, from Secretary of War to Governor of Washington. | Tr. 778 |
| | | Offered |
| | | Tr. 779 |
| | | Admitted |
| | | Tr. 779 |

APPENDIX II

Chronological Statement of Events from December 31, 1946, When the Hanford Area Was Transferred from War Department to Atomic Energy Commission to May 8, 1956, When Appellee's Original Complaint Was Filed

The war in which the United States and the Allied Powers had been engaged having ended, Congress passed the original Atomic Energy Act effective as of August 1, 1946 (42 U.S.C.A. Sections 2011-2281). As authorized by that Act, the President on December 31, 1946, issued Executive Order 9816. By that order (42 U.S.C.A. p. 192) the properties and facilities known as "Manhattan Engineer District, War Department," while under the War Department, were transferred to Atomic Energy Commission. That Act contemplated that the transferred facilities should continue to be used for the production of war materials and for such civilian uses as research might develop.

On September 1, 1950, a labor contract (Defendants' Exhibit 4) was executed between Associated General Contractors of America, Inc., Spokane Chapter, and several local unions, including Operating Engineers Local 370 and Teamsters Local 839. Article I of this contract entitled "WORK AND TERRITORY AFFECTED" provided that it should cover heavy construction and engineering projects in fifteen counties, including Benton County and portions of three other counties lying east of the 120th Meridian in the State of Washington. This contract (Article II) remained in effect until December 31, 1956, when it was superseded by the two contracts now in litigation (Exhibits 2 and 3). This

contract of September 1, 1950, was never applied to construction work within the Hanford Atomic Energy project.

On September 29, 1952, the so-called "Hanford Works Agreement" was executed between a contractors group that became known as "Hanford Contractors Negotiating Committee" and Pasco-Kennewick Building Trades Council and a number of its affiliated local unions, including Operating Engineers Local 370 and Teamsters Local 839. This contract provided that it should be and remain in effect until January 1, 1954, and from year to year thereafter until cancelled by prescribed notice. This contract was applicable to construction work exclusively within the Hanford Area.

The Hanford Works Agreement of September 29, 1952, expressly provided for isolation pay. Isolation pay was an allowance of \$2.62½ per day payable to workmen in addition to their other wages to compensate them, wholly or in part, for time spent in going to and from the actual work site within the Hanford barricade. The particular work site might be anywhere in the 625 square miles included within the exterior boundaries of the Hanford Atomic Energy Project. Bus transportation was not expressly provided for in the contract, but as Mr. Guess, Executive Secretary of Associated General Contractors (Tr. 347), and Mr. Knack, Director of Labor Relations of appellee (Tr. 300), as witnesses for the appellee explained, it was a recognized custom or usage that had prevailed for a long time and the elimination of which would reduce the workman's take-home pay (Tr. 329, 330).

Francis H. Bacon, a rebuttal witness for the appellee, became employed by the Atomic Energy Commission about ten years prior to the time he was testifying on June 18, 1957. That is, he became connected with the Hanford Atomic Energy Project shortly after it was transferred from the War Department to the Atomic Energy Commission. His official position was Deputy Director of Organization and Personnel Division and as such he was particularly concerned with contractor personnel and the working conditions of the various contractors on the project (Tr. 759-760). The project is about 600 square miles in extent and includes the City of Richland, which originally was a small village of about 240 people but has expanded into a city with a population of about 28,000. Richland is located at the southerly end of the project and is an open city. The plants are located north of Richland in a barricaded area and no one is permitted behind the barricade without security clearance (Tr. 761-762). Mr. Bacon explained how the so-called "Hanford Works Agreement" (Exhibit 6) came into existence. The Atomic Energy Commission was contemplating a further expansion program. There was some question as to what part of that program, if any, would be allocated to Hanford. In previous years the labor situation there had been a bit unsatisfactory. Mr. Knapp (of Pasco-Kennewick Building Trades Council) indicated to the Commission that if the program was given to Hanford he would put his house in order. Many local unions had drifted out of the Pasco-Kennewick Building Trades Council and his assurance to the Commission was that if a project agreement which embodied this further

construction work was reached he could assure the Commission that he could present a solid front to all of the unions operating in the construction industry. The objective was to work out an understanding between the unions and prospective contractors so that working conditions would be somewhat uniform and include representation of all unions normally engaged in construction work (Tr. 771-772). As a result of these commitments both by the unions and by Mr. Shaw (a representative of Atomic Energy Commission) language was adopted to make it an obligation of construction contractors to pay "as were determined to be prevailing by the Commission" (Tr. 773). The language contained in the Morrison-Knudsen contract relative to "prevailing wage rates and allowances" is substantially identical with that included in all construction contracts, except that in the Morrison-Knudsen contract there was added the words "during the life of the Hanford Agreement" (Tr. 773-774). With the exception of those added words the provision relative to prevailing wage rates and allowances was the standard clause in all other contracts after the effective date of the so-called "Hanford Works Agreement" (Tr. 774-775).

The contract (Exhibit 4) applicable to work outside the Hanford Area, and Exhibit 6, applicable to work within the Hanford Area, were contemporaneously in effect from their respective dates and until December 31, 1955. Both were in effect at the time the appellee became a member of the Associated General Contractors, Inc., Spokane Chapter, in February, 1955.

Before proceeding further with this chronological statement of events it is desirable, for a clear understanding of later events, to identify Mr. Kenneth M. McCaffree, who was called by appellee as a rebuttal witness (Tr. 725). Mr. McCaffree testified that as of the time he was testifying in June, 1957, he was thirty-eight years of age and since 1949 had been a Professor at the University of Washington in its Economics Department. He had a degree of Doctor of Philosophy in Economics from the University of Chicago granted in 1950. From March, 1953 until October, 1954, while on leave from the University, he served as Executive Secretary of the Hanford Contractors Negotiating Committee. He was never a member of that committee and, so far as the record shows, had no authority to speak for it after he ceased to be executive secretary in October, 1954. It does appear that for a time after he had ceased to be executive secretary he acted as a consultant for J. A. Jones Construction Company (Tr. 725-733). Nevertheless, he continued to use the stationery of the Hanford Contractors Negotiating Committee and represented himself to be its executive secretary.

On September 21, 1955 (Tr. 323 and 351), approximately one year after Mr. McCaffree had ceased to be executive secretary of the Hanford Contractors Negotiating Committee, he started an agitation to eliminate isolation pay and bus transportation. Two months later the appellee, on November 25, 1955, entered into its contract (Exhibit 1) with the United States Atomic Energy Commission for the construction of certain facilities in the Hanford Area for a lump sum of \$1,869,-

580.00. Work under this contract was commenced on November 28, 1955, and continued until the work stoppage which commenced on March 22, 1956. Among other things, this contract provides (Section 32, page 10, under the caption, "PREVAILING WAGE RATES AND ALLOWANCES:")

"During the life of the Hanford Works Agreement the contractor agrees to pay laborers and mechanics engaged in work hereunder at Hanford Works the scale of wages and allowances prevailing at Hanford Works, including all terms of any modification thereof as determined by the Commission ***."

On December 15, 1955, Mr. McCaffree, who had ceased to be executive secretary of Hanford Contractors Negotiating Committee in October, 1954, wrote a letter on the letterhead of that committee to International Union of Operating Engineers Local 370, enclosing a copy of a proposed memorandum agreement to be executed by that committee and various unions affiliated with Pasco-Kennewick Building Trades Council (Exhibit 12). This document proposed that: "*The prevailing agreement on non-governmental construction work in the territory surrounding the Hanford Project shall become effective on January 1, 1956, for corresponding work on the Hanford Project.*"

At the time this proposal was submitted the Teamsters contract of December 19, 1955 (Exhibit 2) and the Operating Engineers contract of December 24, 1955 (Exhibit 3) were in the process of negotiation. The earlier contract of September 1, 1950 (Exhibit 4) was still in effect. Mr. McCaffree made this proposal of December 15, 1955, because he knew that the existing con-

tract dated September 1, 1950 (Exhibit 4) had no application to the Hanford Area. If that were not the fact there would not have been any reason for making the proposal *italicized* above.

On December 19, 1955, the contract (Exhibit 2) between Associated General Contractors of America, Inc., Spokane Chapter, and Teamsters Local 839 was executed, and five days later on December 24, 1955 the contract (Exhibit 3) between Associated General Contractors of America, Inc., Spokane Chapter, and Operating Engineers Local 370 was executed. Teamsters contract (Exhibit 2) and Engineers contract (Exhibit 3) describe the same territory in the State of Washington to which they severally apply. Both contain the same description of territory and work covered (Exhibit 2, page 4; Exhibit 3, page 4), naming nineteen counties and parts of counties in the State of Washington east of the 120th Meridian, including the County of Benton. The description in the two later contracts is substantially identical with the description in the earlier contract (Exhibit 4) which the later contracts superseded, except that in the later contracts Chelan and Kittitas Counties are added. Neither Chelan nor Kittitas Counties is contiguous to the Hanford Area. The contract (Exhibit 4), which expired on December 31, 1955, had no application whatever to work within the Hanford Area. For that reason, if for no other, the two contracts (Exhibits 2 and 3), which superseded it on January 1, 1956, likewise have no application to the Hanford Area.

On December 29, 1955, Kenneth M. McCaffree, who at that time had ceased to be executive secretary of

Hanford Contractors Negotiating Committee, wrote a letter to Pasco-Kennewick Building Trades Council, including the two appellant Local Unions, on the letter-head of Hanford Contractors Negotiating Committee, stating that that committee was then exercising the right to terminate the Hanford Works Agreement of September 29, 1952, as of December 31, 1955.

The first paragraph of this letter states that the notice then being given was in accordance with a letter of October 28, 1955, but no letter of that date is in evidence. The letter of December 29, 1955 (Exhibit 16) states specifically:

“The Hanford Contractors will not stop work on the project as of January 1, 1956. The contractors will maintain wages and conditions in effect on December 31, 1955, until a new agreement or agreements between the Contractors and the Unions involved can be completed.”

The third paragraph of the letter states:

“The wage policy of the project will remain unchanged. In accordance with past practice the Committee is willing to accept those wage scales and effective dates which currently have been negotiated by a particular craft or crafts and the association with which those unions normally negotiate, and which are prevailing in the area surrounding the project. These wages can be placed into effect as soon as agreements are completed between the Hanford Contractors and the respective union or unions.”

On January 1, 1956, the new contracts between Associated General Contractors of America, Inc., Spokane

Chapter, and Teamsters Local 839 and Operating Engineers Local 370 (Exhibits 2 and 3) took effect.

In the letter dated December 29, 1955 written by Kenneth M. McCaffree, as executive secretary of Hanford Contractors Negotiating Committee, giving notice of a conditional cancellation of the Hanford Works agreement as of December 31, 1955, he proposed a meeting to be held on January 5, 1956, at Richland. Two meetings were held on that day. The first meeting—that suggested by Mr. McCaffree—was held in the forenoon at Richland and was attended by Lee J. Knack, appellee's Director of Labor Relations, accompanied by Ramon E. Reed, who had recently become appellee's Project Manager at Hanford. They attended the Richland meeting at the instance of Mr. Thurston of the Atomic Energy Commission (Tr. 702). The other meeting was held at Pasco on the afternoon of the same day. The Pasco meeting was the customary pre-job conference, at which Mr. Knack and Mr. Reed were present as representatives of the appellee for conference with the business agents of the various unions affiliated with the Pasco-Kennewick Trades Council whose members were then, or during the progress of the work, might become interested in the appellee's construction project. At both meetings the matter of continuing isolation pay and bus transportation was discussed. At the Pasco meeting in the afternoon Mr. Knack definitely committed the appellee to a continuance of isolation pay and bus transportation. Because of the importance of Mr. Knack's participation in that pre-job conference, we are printing an Appendix IV, a complete abstract

of the evidence relating to the commitment of Mr. Knack made at that meeting.

Following the pre-job conference at Pasco on January 5, 1956, at which Mr. Knack committed Morrison-Knudsen to continue isolation pay and bus transportation, Mr. McCaffree, on January 13, 1956, wrote another letter on the letterhead of Hanford Contractors Negotiating Committee which he signed as Executive Secretary (Exhibit 13). This letter states that the wage rates effective as of January 1, 1956, in the Operating Engineers contract (Exhibit 3) can not be placed in effect in the Hanford area "until a new agreement has been signed." The letter enclosed a proposed form of agreement referring specifically to the Operating Engineers contract of December 24, 1955 (Exhibit 3) which, if executed, would make that contract applicable to the Hanford Project with some exceptions. This letter and the appended proposed memorandum agreement make it entirely clear that the Hanford Contractors Negotiating Committee, represented by Mr. McCaffree (if he did in fact then represent that committee) knew that the Associated General Contractors new contracts which became effective January 1, 1956, were not applicable to the Hanford Area and could not be made applicable to that area in the absence of an agreement such as he then proposed. Mr. McCaffree not only signed this letter of January 13, 1956, as Executive Secretary, but also signed the enclosed proposed memorandum of agreement as a "member" of Hanford Contractors Negotiating Committee. On the trial he admitted that he never had been a member of that Committee (Tr. 727).

On March 2, 1956, Mr. McCaffree wrote another letter (Exhibit 15) on the letterhead of Hanford Contractors Negotiating Committee to Teamsters Local 839, which he signed as Executive Secretary.

Exhibit 14 is a proposed memorandum of agreement submitted to Operating Engineers Local No. 370 on behalf of Hanford Contractors Negotiating Committee. This is dated "this.....day of March, 1956." This is another proposal submitted in the name of Hanford Contractors Negotiating Committee to Operating Engineers Local 370 substantially identical with Exhibit 13, except that Exhibit 13 proposed that certain allowances should not apply on the Hanford Area until June 30, 1956, whereas this later proposal (Exhibit 14) states that these provisions should not apply until March 12, 1956. Both these proposals (Exhibits 13 and 14) make it entirely clear that so far as Hanford Contractors Negotiating Committee was concerned the Operating Engineers contract of December 24, 1955 (Exhibit 3), as written, had no application to the Hanford Area.

On March 8, 1956, Mr. McCaffree, still representing himself to be Executive Secretary of Hanford Contractors Negotiating Committee, wrote a letter to Associated General Contractors of America, Inc., Spokane Chapter, with copies to Teamsters Local 839 and Operating Engineers Local 370, reading:

"Effective March 9, 1956, those bargaining rights which have been held by the Hanford Contractors Negotiating Committee on behalf of contractors working on the Hanford Project are hereby assigned to the Associated General Contractors Chapters in Spokane on the basis of individual con-

tractor membership in the respective Chapters. These bargaining rights apply to the negotiations with the unions listed below.”

Shortly after this letter was transmitted Mr. McCaffree disappeared from the scene until fifteen months later he reappeared as a rebuttal witness for the appellee (Tr. 725). On the trial Mr. Sam C. Guess, Executive Secretary of Spokane Chapter of Associated General Contractors, said that when he received this rather remarkable letter he was “completely flabbergasted,” because, as he said, “it was an ambiguity in the grossest sense” (Tr. 381-382). Mr. Guess meant, as obviously was the fact, that by this letter Mr. McCaffree could not change the relationship existing between Associated General Contractors of America, Inc., and the unions—parties to the two contracts (Exhibits 2 and 3) which became effective on the preceding January 1, 1956. Mr. Guess’ confusion is easily understandable. However that may be, it is evident that Mr. McCaffree and Mr. Guess at that time were in complete agreement that the contracts which but recently had become effective on January 1, 1956 (Exhibits 2 and 3), as written, had no application to the government work then being performed by the appellee in the Hanford Area.

Whatever notion Doctor McCaffree at that date may have entertained relative to the elementary rules of agency, it is plain that his attempted “assignment of bargaining rights” on March 8, 1956, could not effectively operate to make the two contracts as written and in effect on January 1, 1956, retroactively applicable to the Hanford Atomic Energy Project.

On March 10, 1956, Associated General Contractors of America, Inc., submitted a written document entitled "Hanford Project Proposal" to Operating Engineers Local 370 and Teamsters Local 839 (Exhibit 7). It proposed an "Addendum" (according to the dictionary an addendum is an amendment) to the existing A.G.C. agreements to be effective March 12, 1956, making the provisions of the A.G.C. agreements (Exhibits 2 and 3) applicable to the Hanford Project with two exceptions. The exceptions proposed were:

"A travel allowance of \$2.62½ per day will be paid on all A.E.C. contracts for the period March 12 to December 31, 1956.

"On January 1, 1957, there will be placed into effect the 1958 travel provisions of the A.G.C. agreements which will continue through the years 1957-1958."

The effect of the first exception would be to continue isolation pay of \$2.62½ per day until December 31, 1956. The effect of the second exception would be that on January 1, 1957, certain travel provisions of the existing A.G.C. agreements would continue through the years 1957-1958. If the Unions had agreed to this proposal the effect would have been to continue isolation pay for a time, but bus transportation would be completely eliminated. This is a vital document bearing upon the question whether or not the labor contracts (Exhibits 2 and 3) in effect since January 1, 1956, were or were not intended to be applicable to work being carried on within the Hanford Area. As this Exhibit 7 discloses, this proposal was voted on on March 14, 1956, by

the Teamsters and rejected, and it was also rejected by the Engineers.

Mr. Guess, on his direct examination as a witness for the appellee, testified that the acceptance of this proposal by the Unions would have meant a modification of Exhibits 2 and 3. He further testified that at a meeting between the representatives of the Unions and the representatives of the contractors on March 16, 1956, this proposal was definitely turned down by both the Teamsters and the Operating Engineers. After that refusal of the Unions to agree to the proposed amendment a recommendation was made to the contractors then working at the Hanford Works, which, of course, included the appellee Morrison-Knudsen, Inc., to continue to pay isolation pay and furnish buses until such time as an agreement could be reached (Tr. 332-333). If, as the appellee is now claiming, the two contracts, as written and in effect on January 1, 1956, were applicable to work being performed in the Hanford Area, why was the Associated General Contractors on March 10, 1956—sixty-eight days later—seeking an amendment to the contracts as written for the sole purpose of making those contracts applicable to the Hanford Area? The appellee's entire case is founded upon the contention that the two labor contracts (Exhibits 2 and 3), as written and effective on January 1, 1956, by their very terms were applicable to work in the Hanford Area. If it be assumed that there is any merit whatever in appellee's contention, which, of course, the appellants do not admit, then the definite, unequivocal and final rejection of the proposal evidenced by this Exhibit 7 was a re-

pudiation of the appellants' contractual obligations, and by reason of that repudiation, the appellee then became an "offended party" as defined by Article IX of Teamsters contract (Exhibit 2) and Article X of Engineers contract (Exhibit 3). This matter is argued as Point III(C).

On the morning of March 23, 1956, the members of the appellant Unions reported for work as usual at the North Richland Terminal, but the appellee failed to have buses available for their transportation to the work sites and they had no alternative but to go home. A work stoppage ensued which continued until June 6, 1956. The basis of appellee's claim is that this work stoppage was an illegal strike in violation of Article VII of the Teamsters contract (Exhibit 2, page 10) and Article VIII of the Engineers' contract (Exhibit 3, page 9), both of which, in identical language, prohibit strikes and lockouts. The appellee now says when the workmen went home because no buses were made available to them their action constituted an unlawful strike. The appellants say that the men went home because of a lockout resulting from appellee's action in summarily discontinuing the usual bus service.

Under date of March 30, 1956, Sam C. Guess, as Executive Secretary of Associated General Contractors of America, wrote a letter (Exhibit 8) to Art Rossman of Operating Engineers Local 370, referring to the work stoppage then existing, to which Mr. Rossman replied by a letter dated April 3, 1956 (Exhibit 9).

When the appellee persisted in its refusal to furnish

bus service, the job was picketed on April 5, 1956 (Tr. 409).

Under date of April 27, 1956, the lockout, then having existed for thirty-five days, appellee's attorneys, Allen, DeGarmo & Leedy, wrote a letter to the two appellant Unions concerning the dispute. This letter was attached to the original complaint as Exhibit C and by reference made a part of the amended complaint. The fourth paragraph of that letter stated:

“Morrison-Knudsen Company, Inc., as a member of the Associated General Contractors of America, Inc., Spokane Chapter, has at all times since January 1, 1956, recognized said Agreements heretofore mentioned as being in force and effect with your organizations and your members, applicable to the work being performed by it at the Hanford Atomic Products Operation, * * *.”

As a matter of convenience for reference, a photostatic copy of this letter was offered and received in evidence as Exhibit 50. Notwithstanding the claim in the letter that the appellee recognized the agreements referred to as being in force since January 1, 1956, and applicable to the Hanford Area, Mr. Knack, the appellee's Labor Relations Director, who cooperated with appellee's attorneys in composing the letter, admitted on the trial that until the date of that letter, so far as he knew, no one directly representing Morrison-Knudsen had ever made any claim that the contracts, as written and in effect on January 1, 1956, were applicable to the appellee's work in the Hanford Area (Tr. 297-299). After that admission by Mr. Knack nothing more was heard of this letter, which appellee's counsel must have

thought was important when they made it an exhibit to their original complaint.

The letter last referred to no doubt was written for strategic or disciplinary purposes preliminary to the filing of a damage action. Accordingly, the original complaint was filed on May 8, 1957, forty-seven days after the lockout first occurred. In that complaint the appellee alleged damage accrued to April 30, 1956, in the sum of \$638,500.00, together with additional damage of not less than \$13,000.00 per day during the period that the lockout might continue beyond that date.

APPENDIX III

The Labor Contracts Must Be Construed in the Light of the Circumstances Surrounding the Parties When the Contracts Were Being Negotiated

In *Merriam v. United States*, 107 U.S. 437, page 441, 27 L.ed. 531, page 533, the court said:

“It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.” (Citing cases)

In *C. R. I. & P. R. Co. v. Denver, etc.*, 143 U.S. 596, page 609, 31 L.ed. 277, page 281, the court said:

“There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed.”

In *United States v. Bethlehem Steel Company*, 205 U.S. 105, page 117, 51 L.ed. 731, page 736, the court specifically held that the Parol Evidence Rule is inapplicable to such situations:

“It is objected on the part of the company that, as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or to documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a

written contract between the parties is referred to, and it is insisted that, under that rule, the various letters passing between the parties prior to the execution of the contract are not admissible.

“The rule that prior negotiations are merged in the contract is general in its nature, and, we think, does not preclude reference to letters between the parties prior to the execution of the contract in this case. The language employed in this contract for a deduction, in the discretion of the Chief of Ordnance, of \$35 per day from the price to be paid for each day of delay in the delivery of each gun carriage, respectively, taken in connection with the subject-matter of the contract, leaves room for the construction of that language in order to determine which was intended, a penalty or liquidated damages. While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract. (Citing cases)

“It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that, in cases of doubt as to the meaning of language actually used, prior negotiations may sometimes be referred to.”

The applicable rule is concisely stated in 17 C.J.S., page 744, Title Contracts, Section 321, as follows:

“Where the language of a contract is susceptible of more than one interpretation, but not otherwise, the court, in ascertaining the intention of the parties, may and should consider, and construe the contract in the light of the situation and relation of the parties and the circumstances surrounding them at the time of making the contract, the nature and situation of the subject matter, and the apparent purpose of making the contract.”

To support the quoted text the editors cite numerous Federal cases, together with several hundred cases from appellate courts of thirty-eight states, including Washington.

Among the decisions in which the Supreme Court of Washington has recognized and applied the rule are:

Griffin v. Lear, 123 Wash. 191, 212 Pac. 271;

Leavenworth State Bank v. Cashmere Apple Co., 118 Wash. 356, page 361, 204 Pac. 5;

Vance v. Ingram, 16 Wn.(2d) 399, page 411, 133 P.(2d) 938;

Skaug v. Gibbs, 39 Wn.(2d) 269, page 270, 235 P.(2d) 154;

Kelly v. Valley Construction Co., 43 Wn.(2d) 679, page 688, 262 P.(2d) 970;

Williston on Contracts, Vol. 3, Section 629.

APPENDIX IV

Abstract of Evidence Concerning Commitment to Continue Isolation Pay and Bus Transportation Made by Lee J. Knack, Appellee's Director of Labor Relations, at Pre-Job Conference Held at Pasco on January 5, 1956

Mr. Knack, appellee's Director of Labor Relations, on direct examination by appellee's counsel, testified that he was familiar with the provisions of the contract between Morrison-Knudsen Company and United States Atomic Energy Commission which obligated Morrison-Knudsen to abide by the provisions of the Hanford Works agreement as long as it was in existence (Tr. 209).

On cross-examination by counsel for Operating Engineers Local 370 Mr. Knack said that at the time his company became a member of Associated General Contractors in February, 1955, he was aware of the then existing contract (Defendants' Exhibit 4) between Associated General Contractors and the various unions, including the two defendants (Tr. 217). He also knew of the provisions of the Hanford Works agreement (Tr. 223-224) and that it was in effect when his company bid the job (Tr. 236). He understood that the references to "allowances" which appellee's contract with the Atomic Energy Commission required it to maintain included isolation pay and bus transportation (Tr. 237). He learned of Mr. McCaffree's letter of December 29, 1955 (Exhibit 16) on January 4, 1956—the day before the Richland and Pasco meetings (Tr. 238). The status of the Hanford Works agreement came up for discussion at both the meetings on January 5, 1956 (Tr. 240-241). At the morning meeting

there was considerable discussion pertaining to the Hanford Works agreement and it was impossible for him to tell whether or not the Hanford agreement, from a practical standpoint, was totally and completely terminated. On January 4, 1956, Mr. Knack had learned of the communications concerning the technical termination and that matter "was definitely one that was up in the air at the time we had our meeting on the 5th of January" (Tr. 244). Mr. Knack said that at that time, as far as he was concerned, he had no indication that the Hanford Works agreement had ceased to exist. He said it was a moot question. The appellee's work at Hanford had commenced before the meetings on January 5, 1956, and from the commencement of the work until March 22, 1956, Morrison-Knudsen furnished bus transportation to the defendant Unions in accord with the provisions of the Hanford Works agreement (Tr. 246).

On cross-examination by counsel for Teamsters Local 839 Mr. Knack testified that Mr. Henry Thurston of the Atomic Energy Commission was present at the meeting at Richland on the morning of January 5, 1956 (Tr. 272). Mr. Knack had learned of the proposed Richland meeting the day before from Mr. Thurston and he was vitally interested because not long before his company had entered into the contract with Atomic Energy Commission. Representatives of the Atomic Energy Commission, the contractors and labor unions were present. There was discussion concerning bus transportation and isolation pay. The afternoon meeting was held in the Labor Temple in Pasco. That meeting had been requested by Morrison-Knudsen some time

in the middle of December (Tr. 279-280). That afternoon meeting was a pre-job conference arranged after Morrison-Knudsen knew it was going to do the work under its contract of November 25, 1955. Representatives of the Local Unions were present whose members might be employed. Mr. Knack definitely recalled that Mr. Knapp was present (Tr. 281-282). Mr. Knack was asked the direct question if it was not a fact that at the Pasco meeting he was asked by Mr. Knapp as to what Morrison-Knudsen proposed to do about continuing to pay isolation pay and furnishing bus transportation (Tr. 294). Mr. Knack answered that he did not recall whether the question was put to him by Mr. Knapp or not

“but the question was put to me as to what our position was in relation to the payment of isolation pay and the continuing transportation as the matter stood at that moment. In other words, there was no question asked of me as to how we were going to operate through to the completion of our work on that project, and because of my contact with the morning session as an observer, in which it was indicative of the fact that these people who had been negotiating previously and were still discussing matters between themselves, that they were endeavoring to arrive at some sort of a solution of their problems, and that on that basis, *that we of the Morrison-Knudsen Company were not going to be the people who were going to discontinue that practice*; in view of the fact that other contractors there were continuing the practice, were still paying the pay, that it was unrealistic to believe that we could do so and employ people under those competitive conditions.” (Tr. 295)

On re-direct examination by appellee's counsel Mr. Knack said that the furnishing of bus transportation was an established practice on the Hanford Works (Tr. 300).

Sam C. Guess, Executive Secretary of the Spokane Chapter of Associated General Contractors, Inc., who, on behalf of that organization, executed the two labor contracts (Exhibits 2 and 3) with Teamsters Local 839 and Operating Engineers Local 370, was examined as a witness on behalf of the appellee. He testified that he was familiar with the history of the practice or custom of furnishing bus transportation (Tr. 319). In answer to some questions propounded by the court Mr. Guess said that the main entrance into the reservation is through North Richland and that most of the workmen enter the project through the North Richland barrier. Some of the workmen drive their own private cars into the barricaded area and about forty per cent of them ride the buses. The area is large, the distance from North Richland to the Moxee entrance being in excess of thirty-five miles (Tr. 318-320). Referring to the time after the two Associated General Contractors agreements (Exhibits 2 and 3) became effective on January 1, 1956, Mr. Guess said that because of the urging of the Atomic Energy Commission's staff, and Mr. Thurston in particular, the contractors working behind the barrier did nothing to upset the conditions because of the very critical nature of the work going on (Tr. 327-328). The matter under discussion at the time referred to was the amount of take-home pay which would possibly be changed by going under the

Spokane Chapter agreements. If the conditions under which Hanford had been working were terminated the workmen would no longer be paid isolation pay or furnished bus transportation, and to eliminate one or the other would make some difference in the amount of money that a man could take home (Tr. 329-330). Mr. Guess then stated that Mr. Rossman (Business Manager of Operating Engineers Local 370) was demanding the continuance of isolation pay and bus transportation (Tr. 331). Mr. Guess had become Executive Secretary of the Spokane Chapter of Associated General Contractors on January 20, 1954 (Tr. 313) and it came to his knowledge that bus transportation was being furnished and isolation pay was being paid to workmen employed inside the barricade (Tr. 346). The provision for isolation pay was in the written contract (Hanford Works agreement). The furnishing of buses was a usage that had grown up (Tr. 347).

In the middle of December, 1955, Ramon E. Reed became Project Manager for the appellee at Hanford and in that capacity was its Chief Officer in Charge of the Project (Tr. 403). He accompanied Mr. Knack to the meetings at Richland and Pasco on January 5, 1956 (Tr. 405). On cross-examination by counsel for Operating Engineers Local 370 Mr. Reed was asked as to his recollection of a conversation at the pre-job conference on the afternoon of January 5, 1956, at Pasco between Mr. Knapp (representative of the Unions) and Mr. Knack (appellee's Director of Labor Relations) concerning the continuance of isolation pay and bus transportation. Mr. Reed said that he did remember that there was a discussion along those lines but he did not

remember the "exact wording" (Tr. 416-417). It is not surprising that Mr. Reed could not remember the "exact wording" inasmuch as he was testifying on June 12, 1957—about seventeen months after the date of the conversation between Mr. Knapp and Mr. Knack and he, Mr. Reed, was not the spokesman for the appellee.

Charles J. Knapp was called as a defense witness (Tr. 469). At the time in question he was Secretary of the Pasco-Kennewick Building Trades Council and representative of the Plasterers and Cement Finishers Union. He had been familiar with the labor situation at Hanford since 1943. He had arranged for the meeting with representatives of Morrison Knudsen which was held on January 5, 1956 (Tr. 476). At that meeting there were present representatives of about fifteen individual crafts, including William Dunn and Arthur A. Rossman of the Operating Engineers; Sewell Davis of the Teamsters; Edwards Clary of the Painters Local Union, and Lawrence R. King of the Millwrights (Tr. 476-477). The Pasco meeting was the usual pre-job conference held when a major job is being started, so that representatives of the Unions and the employer might discuss matters relating to manpower needed and various phases of the contractor's work (Tr. 477). Mr. Knapp testified that there were two matters concerning which he was particularly interested and these were what the company intended to do in reference to furnishing transportation and the payment of isolation pay. He discussed two points with Mr. Knack. Mr. Knapp was spokesman for the union group and he was the one who asked the question of Mr. Lee Knack:

“Q. All right, and when you asked the question, did you direct it to Mr. Knack?

A. Yes.

Q. And what did he say?

A. He said that they would pay isolation pay and continue to furnish transportation. He said that the Morrison-Knudsen Company had bid the job planning on paying isolation pay and furnishing bus transportation; that was the way they figured the job.” (Tr. 479-483)

Mr. Knapp was cross-examined at some length with particular reference to his discussion with Mr. Knack and said that he remembered distinctly that at the time there was considerable disquiet about a continuance of the Hanford Works agreement and Mr. Knack said “that he was not interested in what other contractors were going to do. He said that they had bid the job on isolation pay and free bus transportation and they were going to do it. They were going to do the job. He said they were particularly interested in coming in, getting the job done and getting out again” (Tr. 525-529).

William H. Dunn, Field Representative of Operating Engineers Local 370, was present at the Pasco pre-job conference on the afternoon of January 5, 1956. Mr. Dunn testified:

“A. Well, the meeting progressed along, it was just about ready to break up, in fact, some of the fellows had started getting up from the table, and Mr. Knapp said to Mr. Lee Knack, ‘I got a question I want to ask you,’ and he asked him what was going to be their position pertaining to isolation

pay and free bus transportation, and Mr. Knack's reply to him was, 'We bid this under the Hanford Works agreement and we are going to do the job under that.' In those words, that is what the man meant.'" (Tr. 560)

On cross-examination by counsel for appellee Mr. Dunn repeated, in substance, what he had testified to on direct examination, but qualified it to the extent that Mr. Knack may have said that they were not willing to enter into an arrangement for the duration of the job unless the Unions were willing to do likewise" (Tr. 564).

Arthur A. Rossman, Business Manager of Operating Engineers Local 370, testified on direct examination that he was present at the Pasco pre-job conference on the afternoon of January 5, 1956, that there were representatives of about fifteen unions present in addition to the two men—Mr. Knack and Mr. Reed—representatives of Morrison-Knudsen (Tr. 612-613). Near the end of that meeting Mr. Knapp asked what the company's intention was with regard to bus transportation and isolation pay (Tr. 616). Mr. Rossman said that while he would not undertake to quote Mr. Knack verbatim the substance of his statement was as related by Mr. Knapp (Tr. 621-622). Mr. Knapp was speaking for his own Union—Cement Finishers—as well as for Operating Engineers Local 370 and Teamsters Local 839, and if Mr. Knapp had not asked the question Mr. Rossman would have done so (Tr. 623).

On cross-examination by appellee's counsel Mr. Rossman said that Sewell Davis (Teamsters Representative) was present at the Pasco meeting but that "I

know Mr. Charlie Knapp spoke for all of us'' (Tr. 629). Mr. Knapp said he was representing the Pasco-Kennewick Building Trades Council and the affiliated unions (Tr. 635).

Harold Edward Clary, the Business Representative of Painters Local Union 427, was present at the Pasco pre-job conference on January 5, 1956. He said that toward the completion of that meeting Mr. Knapp and Mr. Knack conferred, that the matter of isolation pay and bus transportation was discussed and the substance of the conversation was that Mr. Knack said "that they weren't desirous of upsetting anything or establishing any precedent" (Tr. 669-671).

Lawrence R. King, Business Representative of Millwrights and Machinery Erectors, Local Union 1699, was present at the Pasco meeting on January 5, 1956. His Union was affiliated with the Pasco-Kennewick Building Trades Council. Towards the end of that meeting Mr. Knapp asked what Morrison-Knudsen Company's position was going to be as to bus transportation and isolation pay. Mr. Knack answered to the effect that they weren't there to disrupt anything that had been going on and that he would continue to pay it (isolation pay) and furnish transportation (Tr. 672-675).

The defendants having rested, Mr. Lee J. Knack was examined by the appellee as a rebuttal witness. On direct examination (Tr. 700) he said that he was present at the morning meeting of January 5, 1956, at Richland. He and Mr. Reed, the Project Manager, were asked to attend that meeting specifically by Mr. Thur-

ston of the Atomic Energy Commission and they did attend as observers (Tr. 702). He and Mr. Reed attended the afternoon meeting at Pasco (Tr. 705). That meeting lasted about three hours and various matters were discussed (Tr. 706). Mr. Knack's direct examination on rebuttal then continued as follows:

“There was also the question that was posed as to the circumstances relating to the practice that prevailed in the area of the payment of transportation or furnishing transportation and isolation pay.

Q. All right, now, on that subject, Mr. Knack, I want to ask you specifically, you were present in court during the testimony of Mr. Dunn and Mr. Rossman and Mr. Clary. Without asking you to either dispute or approve what they said, I wish you to tell the Court now your recollection of exactly what question was asked you and what answer you gave to the question concerning the question of bus transportation and isolation pay.

A. Well, the question was put to me about the payment of bus—or furnishing of bus transportation and the payment of isolation pay, and my first and immediate reaction to it was that certainly I didn't think that it was fair for the—

Q. I want you to state what you said, not what your reaction was.

A. Well, I said this, this is what I said. This was my—when I said reaction, I should have said response. I said that it was not fair for the people there to figure that they could use the Morrison-Knudsen Company as the solution to their problem or as a wedge when they had the problem with other contractors; that we certainly were not there

to either be the solution to problems, nor to establish or break precedents, as the case may be; that their problems had to be dealt with with the people with whom they had the problem, and that insofar as the conditions and circumstances were involved, that we were not—I was not going to tell them that we were going to discontinue furnishing the transportation or paying the isolation pay but that certainly there was a problem there that I didn't know when that problem was going to be answered, nor did I know how it was going to be answered, and, therefore, I felt that they were attempting to get the solution to the problem from me when I was not the party nor my company was the people who could solve the problem for them.

Q. Had you learned of this problem in the morning meeting at which Mr. Rossman and these other parties were present?

A. Yes.

Q. I want to ask you specifically, Mr. Knack, what information, if any, you had at the time as to the basis upon which Morrison-Knudsen Company made its bid for the Hanford Works Contract?

A. I had no knowledge as to how that job was specifically bid at that time.

Q. Why did you have no knowledge?

A. Well, the explanation for that, sir, requires a little bit of explanation of the relationship of how I function within the Labor Relations Department for the company.

Our company is set up in divisions and districts, and it is my job to service the various divisions and districts upon request. One of the services that my office furnishes to those divisions and districts is

labor information on prospective jobs which are to be bid. At again by request of the district or division, will send me a form which we have and request me to fill in the form on the various crafts or classifications, and so forth. This job having been bid out of our Seattle District, I had not been requested to furnish the information, the labor information, for the bidding of this particular job.

Q. Then, as of the date of this meeting on January 5th, 1956, what information did you have as to whether bus transportation or isolation pay had or had not been included in any bid estimate?

A. I would have no information of that at all at that time.

Q. I wish to ask you the specific question, Mr. Knack, as to what statement you made at this meeting as to the Morrison-Knudsen Company having bid this job on the basis of paying isolation pay and furnishing bus transportation?

A. There was some discussion as to how we may have bid the job and that resulted in my pointing out that the question of how we bid jobs and how we are going to operate those jobs is one that I would be quite interested in going into in a deeper vein in all areas, and pointed out that I had never yet been approached by any organized labor that would sit down at the time we were figuring a job or after we had figured a job and would agree to complete the job as we had bid it; that constantly we were confronted with the problem of bidding jobs and during the course and life of that job being confronted with rising costs of wage increase, labor costs, and so forth, and I made reference to that situation and pointed to one of the incidents that had occurred, a negotiation that I had

just come off of where that was highlighted, Table Rock Dam down in Missouri, and spent some time explaining the situation about bidding jobs and the relationship as to how they are bid and the costs after we get them.

Q. I wish to ask you, Mr. Knack—I am reading now from a transcript of Mr. Knapp's testimony—if at this meeting you made this statement:

‘He said they would pay isolation pay and continue to furnish transportation. He said that the Morrison-Knudsen Company had bid the job planning on paying isolation pay and furnishing transportation; that was the way they figured the job.’

A. No, I did not.

Q. I am reading to you now from a transcript of the testimony of Mr. William H. Dunn. I wish to ask you if at this meeting on the 5th of January, 1956, you made this statement in response to the question which Mr. Knapp states he asked you:

‘We bid this under the Hanford Works Agreement and we are going to do the job under that.’

A. I did not.

Q. Did you make any statement, Mr. Knack, other than as you have just testified here?

A. In relation to—

Q. In relation to that particular subject?

A. Not—insofar as words are concerned, the substance of what was said is what I have testified to.” (Tr. 708-712)

It will be noticed that on his direct examination by appellee's counsel Mr. Knack was asked if he used the exact words imputed to him by Mr. Knapp and Mr.

Dunn and his answer was "Not—insofar as words are concerned."

On cross-examination by counsel for Operating Engineers Local 370 Mr. Knack admitted that he said they were not there to solve or to break precedents and that concerned bus transportation and isolation pay. He understood that that was an important matter (Tr. 713).

"A. They asked me the question, yes, they brought it up for discussion.

Q. Well, when they asked you that question, whether you were going to do it or whether you were not going to do it, did you tell them one way or the other what you were going to do?

A. I indicated that under the circumstances that I was going to tell them that at the time we were not going to discontinue the furnishing of the transportation and the payment of isolation pay.

Q. What did you say then, that you were not going to discontinue isolation pay or bus transportation?

A. As of that time?

Q. Yes, as of that time?

A. That is correct.

Q. What did you tell them, as of the 5th?

A. Of what time did I tell them what, sir?

Q. Yes, you say now that what you told them was you were not going to discontinue the isolation pay and you were not going to discontinue the bus transportation?

A. That is correct.

Q. Well, did you say, did you qualify that and

say 'Now' or 'Until the end of this job' or 'Half-way through this job?' How did you qualify that, if you did qualify it?

A. I didn't qualify it.

Q. I see. Then, what you said was, 'We are not going to discontinue it'?

A. 'At this time.'

Q. I see. 'At this time'?

A. Yes.

Q. In other words, now—

A. Indicating and going on to the point that they had the problem with the other people there and the question of the isolation pay and the bus transportation insofar as future was concerned was a problem for them to solve with the people with whom they had been dealing and the other contractors.

Q. Well, didn't they ask you whether you were going to continue this on your contract? Isn't that what you said?

A. They wanted to know if we were going to pay it—

Q. Yes.

A. —at that time, certainly.

Q. Yes. And you said you were?

A. Yes, I said that we were not going to discontinue it at that time." (Tr. 714-715)

On cross-examination by counsel for Teamsters Local 839 Mr. Knack repeated that he attended the morning meeting at Richland as an observer, but that he went to the area specifically to participate in the afternoon meeting at Pasco, that was the purpose of

his visit (Tr. 719). He learned of the problem through conversations with Mr. Thurston of the A.E.C. (Tr. 721).

“Q. Well, isn’t it a fact, Mr. Knack, that what you meant, or the view you intended to express, in that meeting representing Morrison-Knudsen, you did not want to be forced into a position, at the instance of other contractors or anybody else, which would put you in conflict with the unions on the job then in progress?

A. I don’t think I expressed it that way, Mr. Carey. To me, having come into the area and not having had some, at least, current background of the circumstances and conditions, I was aware only of the fact that there was a problem there that may have been involved in meetings, and so forth, I was totally unaware of it, and in my conversations with Mr. Thurston the morning before we met with the unions, Mr. Thurston requested the Morrison-Knudsen Company to continue paying the isolation pay and the furnishing of bus transportation. At the time, I asked him if that was an official request. He said, because of the circumstances, he could only make it as an unofficial request. That was part of the circumstances.

MR. CAREY: Well, will you read my question again? (Question read)

Q. (By MR. CAREY): Isn’t that, in substance, the position you took?

A. Well, sir, when you asked the questions about being forced by other contractors, I felt no factor of force by other contractors at all.

Q. Well, isn’t that, in substance, what you meant when this morning you said you didn’t want to be

used as a wedge, when last Monday or a week ago Monday you said you didn't want to get 'in the bite of the line'? Isn't that, in substance, what you meant?

A. Well, in substance, what I meant, sir, was that I didn't want to be—our company to be the people who were going to lead the way and be put in a position—as a newcomer to the work, we had not been involved in these things in the past, our position was somewhat different from other contractors, substantially different, as a matter of fact, and that I didn't want my company being the company that was going to be the party to come into that area and cause conditions, either to the area or to ourselves—

Q. That is, you didn't want to disrupt a working arrangement that had been in existence for some considerable time?

A. At that particular time, in view of the conversations that I had had with Mr. Thurston, I felt that it was expedient for our company, even though the request had been unofficial, under the circumstances, to abide by that request." (Tr. 721-723)

APPENDIX V — EXHIBITS INTRODUCED ON TRIAL OF ISSUE OF DAMAGE

. x. 21:	Construction Status Chart of "F" Area, showing estimated cost \$908,380.00, dated 1/20/56.	Identified Tr. 787 Offered Tr. 800 Admitted Tr. 800
. x. 22:	Construction Status Chart for "H" Area, showing estimated cost \$868,800.00, dated 1/20/56.	Identified Tr. 791 Offered Tr. 800 Admitted Tr. 800
. x. 23:	Revenue Tabulation covering period December, 1955-March, 1957, inclusive.	Identified Tr. 792 Offered Tr. 800 Admitted Tr. 800
. x. 24:	Graph showing schedules and production.	Identified Tr. 794 Offered Tr. 800 Admitted Tr. 800
. x. 25:	Statement purporting to show delay of ninety-eight days chargeable to strike.	Identified Tr. 797 Offered Tr. 800 Admitted Tr. 800

Pl.	Statement showing overhead, salaries during	Identif
Ex. 26:	strike period amounting to \$13,389.00.	Tr. 80
		Offere
		Tr. 80
		Admitt
		Tr. 80
Pl.	Statement concerning Item 3 "Transporta-	Identif
Ex. 27:	tion of Key Personnel for protection of prop-	Tr.
	erty, and so forth.	Offere
		Tr.
		Admitt
		Tr. 10
Pl.	Statement concerning Item 11 relating to	Identif
Ex. 28:	costs of re-employing men to pre-strike level.	Tr.
	Amount claimed \$896.01.	Offere
		Tr.
		Admitt
		Tr. 80
Pl.	Calculation concerning equipment rentals,	Identif
Ex. 29:	Item 8. Total claimed \$27,043.13.	Tr. 80
		Offere
		Tr. 80
		Admitt
		Tr. 80
Pl.	Statement concerning Item 12 "General Ad-	Identif
Ex. 30:	ministrative Expense." Amount claimed	Tr. 80
	\$19,257.00.	Offer
		Tr. 100
		Admitt
		Tr. 100
Pl.	Statement concerning Item 13, extra-strength	Identif
Ex. 31:	concrete. Amount claimed \$675.75.	Tr. 80
		Offer
		Tr. 80
		Admitt
		Tr. 80

32:	Statement concerning Item 14 "Wage Increase After January 1, 1957." Amount claimed \$2,284.49.	Identified Tr. 819 Offered Tr. 820
		Admitted Tr. 820
33:	Statement concerning Item 16. Amount claimed \$89,370.98.	Identified Tr. 820 Offered Tr. 937
		Admitted Tr. 937
34:	Rental Schedule A.G.C. contractor's equipment. On the title page it is stated "This is <i>not</i> a rental schedule."	Identified Tr. 829 Offered Tr. 919
		Admitted Tr. 919
35:	Compilation of rental rates Associated Equipment Distributors.	Identified Tr. 829 Offered Tr. 922
		Admitted Tr. 922
36:	Statement of telephone expenses, Item 5. Amount claimed \$625.86.	Identified Tr. Offered Tr.
		Admitted Tr. 1049
37:	Statement concerning Item 15 "Maintenance of General Electric Company Offices." Amount claimed \$531.76.	Identified Tr. Offered Tr.
		Admitted Tr. 1049

Pl. Ex. 38:	Statement relative to Item 17 "Status Quo Transportation and Isolation Pay." Amount claimed \$6,432.64.	Identified Tr. Offered Tr. Admitted Tr. 104
Pl. Ex. 39:	Statement concerning Item 4 "Director of Labor Relations Costs." Amount claimed \$537.75.	Identified Tr. Offered Tr. Admitted Tr. 104
Pl. Ex. 40:	Voucher for Telephone Bills.	Identified Tr.
Pl. Ex. 41:	Voucher for Telephone Bills.	Offered Tr.
Pl. Ex. 42:	Voucher for Telephone Bills.	
Pl. Ex. 43:	Voucher for Telephone Bills.	
Pl. Ex. 44:	Voucher for: Area Telephone.	Admitted Tr. 104
Pl. Ex. 45:	Statement of extra cost due to strike, office rent, furnishings, etc. Item 2; amount claimed \$1,168.38.	Identified Tr. 104 Offered Tr. 104 Admitted Tr. 104
Pl. Ex. 46:	Statement of Telephone Expense, Item 5. Amount claimed \$633.46.	Identified Tr. Offered Tr. Admitted Tr. 104

47: Statement of Services of Allen, DeGarmo & Leedy, Item 6, in the amount of \$750.00.	Identified Tr. Offered Tr.
	Admitted Tr. 1049
48: Statement concerning Item 10 "Interest on Investment," claimed in the amount of \$1,804.68.	Identified Tr. Offered Tr.
	Admitted Tr. 1049
49: Revised list of plaintiff's claims as made at the trial, amounting to \$182,515.77, which includes loss of profits in the amount of \$16,592.24.	Identified Tr. 937 Offered Tr. 1031
	Admitted Tr. 1031
50: Photostatic copy of letter dated April 27, 1956, from Allen, DeGarmo & Leedy to Teamsters' Local 839 and Engineers' Local 370.	Identified Tr. Offered Tr.
	Admitted Tr. 1049
51: Morrison-Knudsen Administrative Bulletin re Equipment Management Procedure.	Identified Tr. 969 Offered Tr. 971
	Admitted Tr. 971
52: Morrison-Knudsen Statement of Profit and Loss for year 1957.	Identified Tr. 998 Offered Tr. 1004
	Admitted Tr. 1004

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|---------|--|-----------|
| Pl. | Statement concerning Item 12 "General Ad- | Identifie |
| Ex. 53: | ministrative Expense." Amount shown on | Tr. 102 |
| | this statement is \$17,475.00 as contrasted with | Offered |
| | \$19,257.00 as shown on final claim, Plain- | Tr. 102 |
| | tiff's Exhibit 49. | Admitte |
| | | Tr. 102 |
| Pl. | Computation of Excess Labor cost due to | Identifie |
| Ex. 54: | Strike. Amount shown \$41,297.86. | Tr. 102 |
| | | Offered |
| | | Tr. 102 |
| | | Admitte |
| | | Tr. 102 |
| Pl. | Statement of Services of Allen, DeGarmo & | Identifie |
| Ex. 55: | Leedy with bill attached. This statement is | Tr. |
| | identical with Exhibit 47. | Offered |
| | | Tr. |
| | | Admitte |
| | | Tr. 104 |
| Def. | Audit of Morris, Lee & Company made for | Identifie |
| Ex. 56: | defendant unions. | Tr. 105 |
| | | Offered |
| | | Tr. 105 |
| | | Admitte |
| | | Tr. 105 |

**United States Court of Appeals
For the Ninth Circuit**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
LOCAL No. 839, and INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL No. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLEE'S BRIEF

ALLEN, DEGARMO & LEEDY

By GERALD DEGARMO

Attorneys for Appellee

Morrison-Knudsen Company, Inc.

1308 Northern Life Tower,
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STERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, LOCAL No.
839, and INTERNATIONAL UNION OF OP-
ERATING ENGINEERS, LOCAL No. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a cor-
poration, *Appellee.*

No. 16102

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLEE'S BRIEF

PREFACE

and

STATEMENT OF THE CASE

This case presents to the Court for consideration one of the very few instances where a heavy construction contractor has had the courage to seek damages from a Labor Union under the provisions of Section 301 of the Labor Management Relations Act of 1947, otherwise known as 29 U.S.C.A. § 185, or the Taft-Hartley Act.

The facts which caused the institution of this action typify the attitude of many Labor Unions that contracts are only to be regarded as binding upon the employer

or when they are of benefit to the Union. This attitude was directly expressed by Mr. Arthur A. Rossman, Business Agent for the Appellant Operating Engineers, when he testified (Tr. 653):

“A. I repeatedly stated that I couldn’t agree to any settlement that would provide for a cut in take-home pay for my members employed on that project.

Q. You made that statement repeatedly, didn’t you?

A. Many times.

Q. That regardless of what the contract said, you weren’t going to take any cut in pay?

A. That is right.”

It was such an attitude that resulted in the strike by Appellants of the work being performed by Appellee at the Hanford Works Area under Contract with the Atomic Energy Commission, notwithstanding the clear language of Appellants’ Contracts with Appellee “that there shall be no strikes.”

Although the Statement of the Case as contained in Appellants’ Brief is somewhat disconnected and segregated into sections dealing with PROCEEDINGS BEFORE TRIAL, TRIAL OF ISSUE OF LIABILITY and TRIAL OF DAMAGE ISSUE, ENTRY OF JUDGMENT, ETC., we believe sufficient history has been supplied there, throughout the argument in Appellants’ Brief and will be supplied hereafter to adequately acquaint the Court with the details which formed the background for the suit out of which this Appeal arose. Because of the limitations of space permitted by the Rules of Court for this Brief, we will rely upon the statement of facts and issues as

presented by the Briefs, upon the Court's own study of the record and later oral argument to supply any further background thought necessary to a full and complete understanding of the issues presented.

SPECIFICATION OF ERROR I

Appellants first seek to avoid the Judgment against them by the ingenious and very technical argument and contention that the Hanford Works Area, where the strike occurred, was not a part of the State of Washington or Benton County and hence not covered by the Contracts relied upon by Appellee. This proposition was more baldly stated in an early "Defendants' Memorandum Brief" as follows:

"The Hanford Works Project Area is as completely within the exclusive jurisdiction of the Federal Government as is the District of Columbia or the Puget Sound Navy Yard. For legal purposes it is no more a part of Benton County than if it were an island of equal size in the Pacific Ocean."

Accordingly Appellants are asking this Court to declare, as a matter of law, that the Hanford Works Area, some 400,000 acres, more or less (Tr. 56), was and is no part of the State of Washington or of Benton County therein for any purpose.

This argument of Appellants and the Specification of Error raising the issue is without merit or substance for a number of reasons:

First, there is not one word of evidence in the record to which Appellants can point to establish that the parties had in mind or contracted in the light of the technical legal point as raised and relied upon by Appellants.

Second, the Contracts themselves expressly negative the idea that they were not intended to cover the Hanford Works Area, regardless of whether it was a Federal enclave, and

Third, the Hanford Works Area is not within the exclusive jurisdiction of the United States as contended by Appellants.

Appellants first seek to convince the Court that the parties to the Labor Contracts, Exhibits 2 and 3, had in mind when they used "Benton County" the alleged differentiation between such County as Appellants claim it existed in 1943 and as they claim it existed in December 1955. This argument assumes that the parties had in mind the tenuous and complicated legal position as advanced by Appellants, but such assumption is neither supported by evidence nor by reason.

To the contrary, Exhibits 2 and 3 refer to Benton County in the same manner as to all other Counties therein mentioned and any doubt as to the intention of the parties is completely erased by the map which forms the center spread of Exhibit 3 to which we direct the particular attention of the Court.

If, as contended by Appellants, the parties had in mind and contracted with respect to the alleged geographical difference between Benton County in 1943 and 1955 it is not too much to assume that they would have specifically excepted from the operation of the Labor Contracts "Hanford Works" as was done with other excepted areas.

But the further and conclusive answer is that Appellants' contention is not legally sound.

It is of importance when considering Appellants' argument that certain dates be kept continually in mind since they bear heavily upon the validity of the issue.

According to the admitted Requests for Admissions, the Hanford Works Area was condemned by the United States in part on February 23, 1943 (Tr. 54) and in part on April 22, 1943 (Tr. 55, 56). It is therefore necessary to look at the Constitutions and Laws of both the United States and the State of Washington as they existed on the dates mentioned, and to examine decisions of Courts as issued prior and subsequent to such dates.

Appellants have called attention to and relied principally upon Article 1, Section 8, Clause 17 of the Constitution of the United States reading:

“To exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;”

Appellants have failed to call to the attention of the Court that which was brought to their attention and that of the Trial Judge by Appellee, that in 1940 there was passed by the Congress of the United States that which now appears as a part of 40 U.S.C.A. § 255 as follows:

“Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the

United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.”

Appellants have also failed to bring to the attention of the Court that which was brought to their attention and that of the Trial Judge by Appellee, that although the Constitution of the State of Washington by Article XXV provided:

“§ 1. Authority of the United States.—The consent of the State of Washington is hereby given to the exercise, by the congress of the United States, of exclusive legislation in all cases whatsoever over such tracts or parcels of land as are now held or reserved by the government of the United States for the purpose of erecting or maintaining thereon forts, magazines, arsenals, dockyards, lighthouses and other needful buildings, in accordance with the

provisions of the seventeenth paragraph of the eighth section of the first article of the Constitution of the United States, so long as the same shall be so held and reserved by the United States. Provided: That a sufficient description by meets and bounds, and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated, together with copies of the orders, deeds, patents or other evidences in writing of the title of the United States: and provided, that all civil process issued from the courts of this state and such criminal process as may issue under the authority of this state against any person charged with crime in cases arising outside of such reservations, may be served and executed thereon in the same mode and manner, and by the same officers, as if the consent herein given had not been made.”

there was passed by the Legislature of the State in 1939 the following, which now appear as RCW 37.04.010, 37.04.020, 37.04.030 and 37.04.040:

37.04.010. Consent given to acquisition of land by United States.—The consent of this state is hereby given to the acquisition by the United States, or under its authority by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired, in this state by the United States, from any individual, body politic or corporate, as sites for forts, magazines, arsenals, dockyards, and other needful buildings or for any other purpose whatsoever. The evidence of title to such land shall be recorded as in other cases. (1939 c 126 § 1; RRS § 8108-1)

37.04.020. Concurrent jurisdiction ceded—Reverter.—Concurrent jurisdiction with this state in and over any land so acquired by the United States

shall be, and the same is hereby, ceded to the United States, for all purposes for which the land was acquired; but the jurisdiction so ceded shall continue no longer than the United States shall be the owner of such lands, and if the purposes of any grant to or acquisition by the United States shall cease, or the United States shall for five consecutive years fail to use any such land for the purposes of the grant or acquisition, the jurisdiction hereby ceded over the same shall cease and determine, and the right and title thereto shall revert in this state. The jurisdiction ceded shall not vest until the United States shall acquire title of record to such land. (1939 c 126 § 2; RRS § 8108-2)

37.04.030. Reserved jurisdiction of state.—The state of Washington hereby expressly reserves such jurisdiction and authority over land acquired or to be acquired by the United States as aforesaid as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition. (1939 c 126 § 3; RRS § 8108-3)

37.04.040. Previous cessions of jurisdiction saved.—Jurisdiction heretofore ceded to the United States over any land within this state by any previous act of the legislature shall continue according to the terms of the respective cessions: Provided, That if jurisdiction so ceded has not been affirmatively accepted by the United States, or if the United States has failed or ceased to use any such land for the purposes for which acquired, jurisdiction thereover shall be governed by the provisions of this chapter. (1939 c 126 § 4; RRS § 8108-4)

It is with the background of the foregoing legislation the argument of Appellants must be considered and the authorities cited by them examined and analyzed.

There are further facts which bear upon the subject.

By reference to Exhibit 20 (Tr. 71, 72) it will be found that under date of May 26, 1943, Secretary of War Henry L. Stimson made reference to the Congressional and State legislation heretofore quoted and on behalf of the United States accepted "concurrent jurisdiction" over all lands title of record to which had been acquired by the Government for military purposes within the State of Washington and over which concurrent jurisdiction had not theretofore been obtained. As of the date of such Exhibit title to the Hanford Works Area had not in large part been obtained by the United States. Under date of November 8, 1943, Secretary Stimson addressed a letter to Honorable Arthur B. Langlie, then Governor of the State of Washington, calling attention to the earlier communication of May 26, 1943, and stated (Tr. 73, 74):

"Under date of May 26, 1943, the United States accepted concurrent jurisdiction over all lands acquired within that state for military purposes, title to which had vested and over which concurrent jurisdiction had not previously been obtained.

The records of this Department indicate that title to a portion of the Hanford Engineer Works had vested in the United States prior to the above acceptance, and that jurisdiction was thus established over such area.

The War Department does not desire to exercise concurrent jurisdiction over this reservation, but prefers that it remain under the jurisdiction of the State of Washington. It is therefore requested that your records be changed to specifically except the Hanford Engineer Works from the above accept-

ance, and that all interested state officials be notified to the effect that the portion of this reservation covered by the letter of May 26, 1943, should be restored to the jurisdiction of the State of Washington.”

By later letters of January 4, 1944 (Tr. 74), and July 31, 1945 (Tr. 77, 78), Secretary Stimson again excepted from any claim of concurrent or other jurisdiction by the United States “all lands comprising the Hanford Engineer Works, which is located in the Counties of Benton, Grant, Franklin and Yakima.”

It will thus be seen that the argument of Appellants is without substance or merit. The Congress of the United States, by the passage of 40 USCA Section 255, heretofore quoted, established a *conclusive presumption* that no jurisdiction over lands acquired within the borders of a state had been obtained in the absence of a showing of specific acceptance of such jurisdiction. The record here not only affirmatively establishes that no jurisdiction over the Hanford Works Area was accepted by the United States, but that the acceptance of any jurisdiction was affirmatively refused. Further, under the State law as it existed at the time of the condemnation of Hanford Works Area, no more than “concurrent jurisdiction” could have been obtained in any event, and then only subject to the reservations as set forth in the legislative enactments heretofore quoted.

There are further facts which were before the Trial Court and were significant as demonstrating that neither the United States nor the State of Washington con-

sidered the Hanford Works Area other than a part of Benton County, State of Washington.

From the testimony of Mr. Francis H. Bacon of the Atomic Energy Commission forces, it appeared that all criminal laws of the State of Washington are applicable to and enforced within Hanford Works Area by the Sheriff of Benton County and the Sheriffs of other Counties, within which lie the Hanford Works Area, through their respective Deputies (Tr. 762, 763). He further testified (Tr. 763):

“A. The authority is entirely the county laws, codes, and regulations, speed limits, traffic regulations. I think I could go on and on and say even beyond the deputies themselves, the sanitary codes and the public health, and so forth, is subject to the same regulations as elsewhere in the counties.”

Both civil and criminal laws are enforced within the Hanford Works Area by a Justice of the Peace, who has an office and holds Court within the Area under the appointment of the County Supervisors (Tr. 765).

The schools within the Area are under the Washington State Department of Education, the same as other school districts within the State, and receive their per capita from the State, the same as other school districts (Tr. 766). In this connection, attention is directed to Exhibit 18 whereby the United States Atomic Energy Commission recognized the jurisdiction of the Washington State School System over the Area and provided for funds to support the system in lieu of taxes.

Mr. Bacon further testified that as a resident of the Hanford Works Area he voted in State elections as a resident of the State of Washington (Tr. 768).

The Workmen's Compensation Act of the State of Washington was and is considered as applicable to the Hanford Works Area (Tr. 97-119).

Each and all of these factors conclusively demonstrate that Benton County was considered by all persons and by the United States Government as embracing and including the Area of Hanford Works.

There are two additional facts which were brought to the attention of the Trial Court and to which the attention of this Court should be directed clearly demonstrating that the Hanford Works Area was considered by the parties to this action as being within Benton County and subject to the coverage of the Associated General Contractors of America, Spokane Chapter, Area Agreements, Exhibits 2, 3 and 4.

The first is the admission by Mr. William H. Dunn, Field Representative for the Operating Engineers, Local 370, that during both of the years 1955 and 1956 members of the Local were actually working within the Hanford Works Area for contractors under Contract with the Army Engineers, under the AGC Area Agreements (Tr. 582, 583).

The second is that during 1955 and 1956 the Appellants were claiming and receiving health and welfare payments from Appellee under the Associated General Contractors of America, Spokane Chapter, Area Agreements, Exhibits 2, 3 and 4. There was no provision or basis for such payments except under such Agreements (Tr. 572, 573, 666, 667).

Appellants have admitted and the Court found that Appellee was not a party to the Hanford Works Agree-

ment and in any event it was terminated December 31, 1955. Thereafter the only provisions for health and welfare payments were to be found in Exhibit 2 at page 12 and in Exhibit 3 at page 16.

By 29 USCA § 186, it is provided in part as follows:

“Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment

benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees * * *."

The only possible written agreement between Appellee, as the employer, and the membership of Appellants, as the "employees," is to be found in Exhibits 2 and 3 and Appellants cannot and should not be heard to claim the benefits of the Agreements as applicable to the Hanford Works Area in order to collect health and welfare payments and at the same time deny their applicability.

We have examined with care each of the authorities as relied upon by Appellants in support of their position and have found none of them contradictory of the position of Appellee that the Hanford Works Area was not different in character in 1955 from that of 1943 and that such Area was a part of Benton County and the State of Washington for the purposes of the Labor Contracts, Exhibits 2 and 3, and the intent and understanding of the parties as evidenced by the language employed therein.

The early cases of *Kohl, et al., v. United States*, 91 U.S. 367, 33 L.ed. 449 (1875) and *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 29 L.ed. 264 (1884) expressly recognize the principle that the consent of the State to the acquisition of lands by the United States Government might be subject to conditions and reservations as long as the United States in the exercise of its powers would be "free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed." This

principle was further elaborated upon by the Supreme Court in *Collins v. Yosemite Park & C. Co.*, 304 U.S. 518, 82 L.ed. 1502 (1938) in the following language and as indicated by the syllabus from the case as quoted in Appellants' Brief at page 26:

“The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect.

The State urges the constitutional inability of the national government to accept exclusive jurisdiction of any land for purposes other than those specified in Clause 17, § 8, Article 1 of the Constitution. This clause has not been strictly construed. This Court at this term has given full consideration to the constitutional power of the United States to acquire land under Clause 17 without taking exclusive jurisdiction. In that case, it was said: ‘Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation’.”

In each of *Western Union Telegraph Co. v. Chiles*, 214 U.S. 274, 53 L.ed. 994; *United States v. Unzeuta*,

281 U.S. 138, 74 L.ed. 761; *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 73 L.ed. 447; *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L.ed. 1091; *Standard Oil Co. v. California*, 291 U.S. 242, 78 L.ed. 775; *Murray v. Joe Gerrick & Company*, 291 U.S. 315, 78 L.ed. 821; *Pacific Coast Dairy v. Dept. of Agriculture*, 318 U.S. 285, 87 L.ed. 761; *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 88 L.ed. 814; *Yellowstone Park Transp. Co. v. Gallatin County*, 31 F.(2d) 644; *Rogers v. Squier*, 157 F.(2d) 948; *Murphy v. Love*, 249 F.(2d) 783; *Concessions Co. v. Morris*, 109 Wash. 46, 186 Pac. 655, and *Arledge v. Mabry*, 52 N.M. 303, 197 P.(2d) 884, it will be found upon examination that *exclusive jurisdiction* was ceded by the State to the United States reserving only the right to execute process within the ceded area or to tax private property located therein. This distinction and difference immediately renders these cases inapplicable to the instant situation where:

1. Under Federal law it is conclusively presumed that the United States acquired no jurisdiction in the absence of affirmative showing that it accepted jurisdiction over the lands.
2. It affirmatively appears that the United States, through the Secretary of War, refused to accept any jurisdiction over the lands.
3. Under the State law in effect at the time of the acquisition consent was only to "concurrent" rather than "exclusive" jurisdiction in the United States.

It is respectfully submitted that in the light of the applicable Federal and State laws and the circumstances surrounding the condemnation of Hanford Works Area when considered together with the refusal of the United

States to accept any jurisdiction over said lands and the long continued practice of the State of Washington to exercise all rights over said lands, except as inconsistent with the ownership and use thereof by the United States, there is neither factual nor legal merit to the contention of Appellants that Hanford Works Area is not “within the State of Washington” or more specifically within “Benton, Franklin, Grant and Yakima Counties” of said State.

It is further submitted that the acts of the parties to this litigation are inconsistent with the contention that the Contracts, Exhibits 2 and 3, were executed in the light of the technical legal argument as advanced by Appellants.

SPECIFICATIONS OF ERROR II AND VI

Under these Specifications of Error Appellants argue first that they should have been permitted by the Trial Court to vary the terms of the written Contracts, Exhibits 2 and 3, under the guise of showing the circumstances surrounding their execution and second that the evidence established the Contracts were not applicable to the Hanford Works Area.

It is difficult to conceive of two Contracts more clear as to intent of coverage. Under Exhibit 2 (Teamsters) the Territory and Work Covered was defined as follows:

“ARTICLE II—TERRITORY AND WORK COVERED:

Section 1. This Agreement shall cover all Heavy, Highway and Engineering construction work in the following counties or parts of counties East of the 120th Meridian: Grant, Ferry, Stevens, Pend Oreille, Chelan, Lincoln, Spokane, Adams, Whit-

man, Benton, Franklin, Walla Walla, Garfield, Asotin, Columbia, Okanogan, Douglas, Kittitas and Yakima in the State of Washington; and Boundary, Bonner, Kootenai, Benewah, Shoshone, Latah, Nez Perce, Lewis, Clearwater and the North one-half of Idaho County in the State of Idaho. It will be noted that Locals 690, 148, 556, 551 and 839 do not have jurisdiction in Kittitas or Yakima Counties even though those counties extend East of the 120th Meridian. Further, that Local 551's territory extends to a line drawn east and west through Riggins and parallel to the 46th Parallel."

Under Exhibit 3 (Operating Engineers) the Territory and Work Covered was similarly defined:

"ARTICLE II—TERRITORY AND WORK COVERED:

Section 1. This Agreement shall cover all Heavy, Highway and Engineering construction work in the following counties or parts of counties east of the 120th Meridian: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman and Yakima, in the State of Washington; and Benewah, Bonner, Boundary, Clearwater, Kootenai, Latah, Lewis, Nez Perce, Shoshone, and the north one-half of Idaho County, in the State of Idaho."

In an endeavor to overcome this plain and concise language the Appellants sought to show that "Said area, although in part within the exterior boundaries of Benton County, has always been regarded by labor unions and by contractors as segregated from the remainder of Benton County for the purpose of negotiating labor agreements and was so regarded when the labor agreements described in the plaintiff's original and amended

complaints were being negotiated” (Tr. 25) and that the Contracts, Exhibits 2 and 3, did “not apply and was not intended to apply to construction work to be performed by plaintiff for Atomic Energy Commission” (Tr. 25, 26, 30, 31). No more flagrant or studied attempt to vary the precise language of the Contracts by parol evidence can be imagined.

We deem it advisable to point out to the Court at this point that before ruling upon the Motion to Strike the affirmative matter heretofore quoted, the Trial Court inquired of counsel for Defendants (Appellants) as follows (Tr. 184):

“THE COURT: Pardon me, Mr. DeGarmo, before you proceed. I think I should inquire as to whether counsel for defendants feel that this section of their affirmative defense adequately states your position. In other words, are you intending to rely on this language in your permanent defense, or do you think you have evidence that will not—

MR. CAREY: I can’t speak for Mr. Etter but speaking only for myself we are relying upon the affirmative defense as pleaded in our answer to the amended complaint. There is some variation.

MR. DEGARMO: That is the one.

THE COURT: The one set out here?

MR. DEGARMO: Yes, that is correct. You can check it with your answer as I read it to the Court now.

THE COURT: The thought I had in mind, I don’t want to spend considerable time here and have them come in and say, ‘We’d like to amend it because we have evidence here that will go beyond.’

If you intend to rely on this it can be determined on this motion.

MR. CAREY: As far as I know, I have no reason to think that we are not going to rely on that as stated.

THE COURT: Is that true of you, too, Mr. Etter?

MR. ETTER: Yes; there is an amended answer for the Engineers. If Mr. DeGarmo is reciting from that affirmative defense we are relying on that, yes."

Accordingly Appellants are precluded from claiming that any evidence not produced would have gone beyond their pleadings.

Before the rule contended for by Appellants can have any application there must first be some reason or basis for "interpretation" or "construction" by the Court. Here there was nothing to be "interpreted" or "construed." To have permitted Appellants to introduce the evidence they sought, would have been to permit them to say that the parties did not mean or intend what they said and would have been a direct violation of the parol evidence rule.

The following excerpts from American Law Institute Restatement of the Law of Contracts establish the applicable law:

"§ 230. Standard of Interpretation Where There Is Integration.

The Standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent per-

son acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.

Comment:

a.* * * But oral statements by the parties of what they intended the written language to mean are excluded, though these statements might show the parties gave their words a meaning that would not otherwise be apparent. Such a common understanding may justify reformation, but cannot be the basis of interpretation of an integration.* * *

b. Where a contract has been integrated the parties have assented to the written words as the definite expression of their agreement. In ordinary oral negotiations and in many contracts made by correspondence the minds of the parties are not primarily addressed to the symbols which they are using, but merely to the things for which the symbols stand. Where, however, they integrate their agreement they have attempted more than to assent by means of symbols to certain things. They have assented to the writing as the expression of the things to which they agree, therefore the terms of the writing are conclusive, and a contract may have a meaning different from that which either party supposed it to have.”

The following cases from the Supreme Court of the State of Washington support and illustrate the rule: *Brunswick-Balke-Collender Company v. Seattle Brewing & Malting Company*, 98 Wash. 12, 167 Pac. 58; *Vance v. Ingram*, 16 Wn.(2d) 399, 133 P.(2d) 938; *Tube-Art Display, Inc. v. Berg*, 37 Wn.(2d) 1, 221 P. (2d) 510; *Truck-Trailer, Etc. v. S. Birch Etc. Co.*, 38

Wn.(2d) 583, 231 P.(2d) 304; *Jackson v. Domschot*, 40 Wn.(2d) 30, 239 P.(2d) 1058; *Preugschat v. Hedges*, 41 Wn.(2d) 660, 251 P.(2d) 166; *Nelson Equipment Co. v. Goodman*, 42 Wn.(2d) 284, 254 P.(2d) 727.

It is also well established law that parol evidence will not be admitted to create an ambiguity where none in fact exists.

Washington Etc. v. Halferty Etc., 44 Wn.(2d) 646, 269 P.(2d) 806;

Schwieger v. Robbins & Co., 48 Wn.(2d) 22, 290 P.(2d) 984.

In line with the foregoing authorities the Trial Court expressed his views thus (Tr. 189):

“There isn’t here any contention, as I get it there was a mutual mistake, that the plaintiff also was mistaken and thought he wasn’t dealing with Benton County. That, I assume, could not be established, I mean that the plaintiff was mistaken and thought he was not dealing with the Hanford Works or the contract was not to cover the Hanford Works.

It seems to me that here would be bringing evidence to show that while the contract was made to cover Benton County by plain terms, by implication by exclusion of other areas that were not to be included in other counties, and by the maps attached, all indicate that the parties were dealing with Benton County as a geographical unit, as a county, and certainly nobody would have any doubt as to what Benton County, Spokane County or any other county means so far as its covering a particular area is concerned.

I also have in mind that in matters of this importance the parties here, Morrison-Knudsen, these

Local and International Unions, Joint Council of Teamsters, are not like a grocer or a couple of grocers getting together and making a contract without the benefit of counsel or with perhaps counsel who is employed on the spur of the moment. These people are well represented. They have adequate legal staffs and legal representation.

They certainly knew, as everyone knows, what the situation was with reference to the Hanford area and if they did not intend to, if they intended it should be excluded from this contract it seems to me that the lawyers on one side or the other would have spelled it out in plain English and said so."

To foreclose any claim by Appellants of mutual mistake the Trial Court inquired of counsel for Appellants as follows (Tr. 190, 191):

"THE COURT: It would still be the unexpressed intention of the parties contrary to the contention as I see plainly expressed in the instrument. I gather that you are not claiming the legal defense of mutual mistake?

MR. ETTER: No, we don't say mutual mistake."

It is respectfully submitted that under the authorities and clear, concise and unambiguous Contract provisions there was no basis or reason for the introduction of evidence only calculated to violate the parol evidence rule.

Specification of Error VI relates solely to the claim that the Court should have permitted Mr. Sam Guess and Mr. Arthur Rossman to testify that when the two Contracts, Exhibits 2 and 3, were being negotiated it was specifically agreed that construction work within

the Hanford Area was not within the scope of the negotiation (Appellants' Brief page 41). There are several reasons why this testimony was properly excluded.

First of these was that no such "agreement" was pleaded as a defense.

Second, the Statement of Error appearing at page 41 of Appellants' Brief is not in accordance with the offer of proof.

Third, the offer was clearly an attempt to vary the plain, unambiguous, clear and concise language of the written Contracts resulting from prior negotiations.

We are somewhat at a loss to know just what is the basis for the argument appearing on pages 37-41 of Appellants' Brief, but it is apparently tied in with Appendix II in some manner upon the theory that the evidence established the Contracts, Exhibits 2 and 3, were not applicable to Hanford Works Area.

We have already pointed out, in answer to Specification of Error No. I, that Appellants had expressly recognized the applicability of the two Contracts to the Hanford Works Area by working thereunder and by receiving health and welfare payments thereunder as the only basis for such payments. Further the testimony relied upon fails to establish any inapplicability of Exhibits 2 and 3 to the Hanford Works Area.

Parenthetically, although Appellants at page 36 of their Brief indicate that Appendix II is a "statement of events from December 31, 1946 to May 8, 1956" we wish to dispute this assertion. Not only is the "statement" incomplete and not keyed to or supported by the

Transcript, in the large part, but it is also largely argumentative and Appellants' own interpretation of the facts.

On several occasions in Appendix II Appellants make the assertion that Exhibit 4, being the September 1, 1950 Labor Contract between the Associated General Contractors of America, Inc., Spokane Chapter, and several Local Unions, including Operating Engineers, Local 370, and Teamsters Local 839 "was never applied to construction work within the Hanford Atomic Energy project" (Appendix II pages 81, 83, 86) or "had no application whatever to work within the Hanford Area." These statements are misleading and incorrect.

Mr. Sam C. Guess, Executive Secretary of the Spokane Chapter of the Associated General Contractors of America, testified specifically that the Hanford Works Area was within the area of jurisdiction of such Chapter in 1955 and 1956 (Tr. 316). He further testified that prior to Morrison-Knudsen Company, Inc. becoming a member of the Spokane Chapter in 1955 he had no knowledge of any member working in the Area (Tr. 322). Accordingly the question of the inapplicability of the September 1, 1950 Labor Contract to the Hanford Works Area was never raised insofar as the record in this case discloses and the statements of Appellants previously mentioned are merely conclusions on their part without supporting proof.

Much of Appendix II is given over to a discussion of the activities of Kenneth M. McCaffree. Suffice it to comment that Mr. McCaffree admitted that Appellee never signed the Hanford Works Agreement or was rep-

resented by the Hanford Contractors Negotiating Committee (Tr. 729). Upon this point we also wish to direct the attention of the Court to Finding of Fact VI, where appears the following (Tr. 133):

“That each of Defendants Teamsters Local 839 and Operating Engineers Local 370 became a signer of and a party to said Labor Agreement commonly known and referred to as the ‘Hanford Works Agreement,’ and although certain contractors having contracts with the Atomic Energy Commission during the years 1952 to 1955, both inclusive, became signers of said Agreement the Plaintiff never signed said Hanford Works Agreement or authorized the Hanford Contractors Negotiating Committee to negotiate for or represent it.”

Further at page 47 of Appellants’ Brief appears the statement:

“The Appellants do not claim that Doctor McCaffree did have any authority to speak for or bind Appellee.”

In view of the testimony, the foregoing Finding by the Court and Appellants’ admission little else need be said concerning Mr. McCaffree’s activities.

There are, however, two factors mentioned in Appellants’ Appendix II which are not there emphasized or given proper significance.

One of these is the provisions of Article VIII of Exhibit 2 and Article IX of Exhibit 3, which are headed identically and are largely identical (Quotation following is from Exhibit 2):

“ARTICLE VIII—OTHER EMPLOYERS AND SUBCONTRACTORS:

Section 1. As an assurance that all contractors operating in the territory covered by this Agreement will be subject to the same employment conditions, the Unions agree that no member workmen will be furnished any Employer under conditions more favorable to the Employer than those herein established.

Section 2. The Employer agrees that all conditions outlined herein shall be adhered to by Sub-Contractors, (also Owner-Operators).

Section 3. There shall be no special job agreements.”

The Section 3 was new in the 1956-1957-1958 Agreements (Tr. 376) and was inserted at the request of the Unions in accordance with their desire to get Area Agreements applicable to all jobs in the State whether large or small. It was in accordance with this paragraph that the Hanford Works Agreement, which constituted a “Special Job Agreement” was terminated on December 31, 1955 (Tr. 134). Upon the termination of such “Special Job Agreement” all provisions thereof likewise ceased to have any force and effect, except as specifically contained in and covered by the Area Agreements, Exhibits 2 and 3.

That Appellants not only recognized the reason for and effect of the “no special job agreements” provision but claimed rights thereunder was conclusively demonstrated by the testimony of Mr. Lee E. Knack, Labor Relations Director for Appellee, which appears at pages 208-209 of the Transcript. Appellee had, prior to January 1, 1956, entered into a “Special Job Agreement” covering work being performed at the Chief

Joseph Project within the area of coverage of Exhibits 2 and 3 and which work continued on into the year 1956. Mr. Knack testified concerning a meeting held in January of 1956 at which there were in attendance Mr. Rossman and Mr. Hollingsworth on behalf of the Operating Engineers and Mr. Don High on behalf of the Appellant Teamsters, as follows (Tr. 208, 209):

“Q. Now referring to this meeting which I think you stated was held on the 5th of January, 1956, will you state whether either or both of Exhibits 2 and 3 were a subject for discussion at that time and as related to work of Morrison-Knudsen Co.?”

A. I don't remember the exact date of the meeting. I didn't mention that it was January 5, 1956, but it was early in January of '56.

Q. Early in January?

A. Yes, these specific agreements were part of the discussion in that the provision written into the agreement which prohibited project agreements was mentioned and applied directly in relation to our Chief Joseph project, which the purpose of the meeting had been called for, and I was informed that the project agreement could not apply and it would be necessary for these two agreements to apply until the job was completed for the seven or eight months that was involved.

Q. Were the two representatives from the Operating Engineers and the one from the Teamsters that you mentioned present at this meeting?

A. They were present. However, there were others who were present, too, who my memory doesn't permit me to recollect.

Q. What, if any, contention was made at that time, Mr. Knack, that these agreements were not

binding on Morrison-Knudsen Co.? I am referring to Plaintiff's Exhibits 2 and 3.

A. None whatsoever.

Q. Is there any contention that they were binding?

A. Yes, sir."

The above testimony stands undisputed in the record. Appellants are thus in the position of having asserted rights against Appellee under the Contracts, Exhibits 2 and 3, and at the same time now refusing to be bound by such Contracts.

For all of the reasons heretofore mentioned and upon the legal grounds as established by the authorities cited Specifications of Error II and VI are without merit or substance.

SPECIFICATION OF ERROR III-A

Appellants seek to avoid the Judgment in this action by the claim that since Appellee's signature does not appear upon the Contracts, Exhibits 2 and 3, it is not a party thereto.

We have alluded to the fact that Appellants, long prior to the strike on March 22, 1956, and in early January of that year, not only recognized Appellee as a party to such Contracts, but asserted rights against it thereunder in connection with Chief Joseph Dam.

We have also heretofore made mention of the fact that Appellants collected from Appellee health and welfare payments for their members upon the wages earned upon Hanford Works Project and continued to so collect such payments until the completion of Appel-

lee's work. This could not have been done legally except under the provisions of Exhibits 2 and 3.

For the above reasons alone, Appellants should not be heard to deny that Appellee was a party to the Agreements. But there are additional facts which establish Appellee as a real party in interest to the Contracts, Exhibits 2 and 3.

It is immediately self evident that Associated General Contractors of America, Inc., Spokane Chapter, did not negotiate the Contracts for its own benefit. It employed no Teamsters or Operating Engineers as to which the Contracts could in any manner become applicable. The Contracts are meaningless unless it be considered that the Associated General Contractors of America, Inc., Spokane Chapter, in the negotiation and signing of the Contracts acted for and as agent of its members.

That the Associated General Contractors of America, Inc., Spokane Chapter, was actually appointed and designated the agent of Appellee appears affirmatively from the record. Morrison-Knudsen Company, Inc. became a member of the Spokane Chapter in February of 1955 (Tr. 196, 346). Mr. Lee E. Knack, Labor Relations Director of Appellee, testified (Tr. 198):

“But upon joining the Chapter in February of 1955, all of Morrison-Knudsen Co.'s bargaining rights for work with the exception of that work which we were performing at Chief Joseph Powerhouse, all of the bargaining rights with the exception of that project were invested and turned over to the AGC, Spokane Heavy and Highway Chapter. We retained our bargaining rights on Chief Joseph Powerhouse because we had a project agree-

ment which was written for the duration of the project, and, therefore, we retained it. It was actually written in rather peculiar fashion in that it, it was for the duration of the project or until Chief Joseph Builders, which was another contract on the dam part itself, completed their work, whichever occurred earlier.”

There accordingly appears the direct delegation of agency to the Associated General Contractors of America, Inc., Spokane Chapter, to negotiate Labor Contracts covering the area in question.

That a principal can enter into a binding contract through an agent and by the agent’s signature is well established by the following authorities:

Restatement of the Law of Agency 2d, § 292:

“The other party to a contract made by an agent for a disclosed or partially disclosed principal, acting within his authority, apparent authority, or other agency power, is liable to the principal as if he had contracted directly with the principal, unless the principal is excluded as a party by the form or terms of the contract.”

Freeman v. Navarre, 47 Wn.(2d) 760, 289 P. (2d) 1015;

First Nat. Life Assur. Soc. v. Farguhar, 75 Wash. 667, 135 Pac. 619;

Crane v. United States, 55 F.(2d) 734.

Based upon the facts as appearing in the record in this case, as in part heretofore related, and the foregoing authorities, the Court made and entered Finding of Fact V, which in the part material to this Specification of Error reads (Tr. 129, 130):

“That in February of 1955, the Plaintiff became and has at all times since been a member in good standing of Associated General Contractors of America, Inc., Spokane Chapter, and as such member Plaintiff assigned and delegated to said Associated General Contractors of America, Inc., Spokane Chapter, its bargaining rights covering all employee members of Teamsters Local No. 839 and of Operating Engineers Local No. 370 as employed by Plaintiff engaged in Heavy, Highway and Engineering Construction work within the Territory as covered by the Labor Agreements negotiated by said Associated General Contractors of America, Inc., Spokane Chapter. Pursuant to such delegated authority and on behalf of Plaintiff, as one of its members, and for the account and benefit of Plaintiff the Associated General Contractors of America, Inc., Spokane Chapter, as of December 19, 1955, negotiated and entered into a Labor Agreement with Teamsters Local 839, a copy of which is attached to the original Complaint of the Plaintiff herein as Exhibit “A,” and a copy of which was introduced in evidence herein as Plaintiff’s Exhibit 2, and under date of December 24, 1955, negotiated and entered into a Labor Agreement with Operating Engineers Local No. 370, a copy of which is attached to the original Complaint of the Plaintiff herein as Exhibit “B,” and a copy of which was introduced in evidence herein as Plaintiff’s Exhibit 3.”

It is submitted this Finding is amply supported and justified.

Appellants also seek to rely under this Specification of Error upon *Ketcher v. Sheet Metal Workers*, 115 F. Supp. 802, as establishing the proposition that under

the Taft-Hartley Act an employer member of an Employers Association which did not physically affix its signature to a Labor Contract negotiated on its behalf by such Association cannot maintain an action for breach. As counsel for Appellants admit, this case was called to the attention of the Trial Court and failed to receive his favorable consideration. When the reasoning of the United States District Court for the Eastern District of Arkansas, Western Division, upon which the decision was based, is considered the wisdom of the Trial Court's refusal to follow the holding in the *Ketcher* case, *supra*, is apparent. The basis of the *Ketcher* decision is set forth in the following quoted language therefrom:

“It has been uniformly held in the comparatively few cases in which the question has arisen that individual employees may not maintain a suit under Section 185(a); *United Protective Workers of America v. Ford Motor Co.*, 7 Cir., 194 F.2d 997; *Schatte v. International Alliance, etc.*, D.C. Cal. 84 F.Supp. 669; *Brooks v. Hunkin-Conkey Construction Co.*, D.C. Pa., 95 F.Supp. 608. As stated, we see no distinction between an employee who is a member of a labor union and an employer who is a member of an employer's association as far as the right to sue under Section 185(a) is concerned, and while we are not bound by the decisions just cited, we do not feel justified in refusing to follow them, particularly since one of them was rendered by a Federal Appellate Court; moreover, no case holding to the contrary had been cited to us, and we have found no such case.”

When the decisions holding that an individual member of a Labor Union may not maintain an action

against the employer for breach of the Labor Contract under the Taft-Hartley Act are considered, it immediately appears that the reasoning of the Court that there is “no distinction” between such an action and one by the employer against the Labor Union immediately appears as a *non sequitur* and if followed would defeat the entire purpose of the Taft-Hartley Act.

The identical question raised by Appellants in this case was also raised by the Union in the case of *Farina Bros. Co. v. United Brotherhood of Carpenters* (D.C. D. Mass.) 152 F.Supp. 423, in reliance upon the *Ketcher* decision. The Court refused to follow *Ketcher* as illogical and instead stated:

“Defendant refers to the fact that an individual employee member of a union may not sue under § 301. Both as a matter of statutory interpretation and legislative history, I fail to see the force of the analogy. In the ordinary course it is intended that an employer may sue. Where a number of employers in association and the union have bargained jointly, it must be apparent that the employer association is strictly not an “employer” at all. The association may have, at most, a few skeleton employees. It is not for them that it bargained. The terms of the agreement above quoted make clear that each member of Associated was regarded a separate employer. If anyone is unable to sue I think it more possibly Associated.

The union argues that its individual employees cannot sue under the Act, and that since one of its intents is mutuality, individual members of an association of employers should be ruled to be equally disabled. This overlooks substantial differences between individual employers and individual em-

ployees. Normally individual employers may sue. Nor should it be said that they must sacrifice that right because the Board has certified that they may bargain collectively. A suit which could assert only a joint injury to all of the employers would be of very limited utility. If the situation were reversed, could it be thought that the union, by bargaining collectively with a so-called multi-employer (an inaccurate, and correspondingly confusing term, the correct term being multi-employer association), surrendered its right to sue an individual employer for an improper lock-out not participated in by the others? *Cf. Rabouin v. National Labor Relations Board*, 2 Cir., 195 F.2d 906. I believe there were here, in effect, several contracts, whether the individual employers signed or not, and that no disability resulted from the manner they were arrived at. The motion to dismiss is denied.”

Specification of Error III-A is without factual or legal foundation or support and should be disregarded.

SPECIFICATION OF ERROR III-B

By this Specification the Appellants seek to claim the benefit of some alleged “agreement” on the part of Appellee through its Labor Relations Director, Lee E. Knack, to continue the payment of “isolation pay” and to furnish “bus transportation” for the life of the Hanford Works Project and then contend that the ceasing to furnish bus transportation by Appellee constituted a “lockout” of Appellants’ members. Such claim and contention was denied by the Trial Court, who specifically passed thereon in Finding of Fact VIII, as follows (Tr. 135, 136):

“That although the Defendants Teamsters Local

No. 839 and Operating Engineers Local No. 370 pleaded by way of trial amendment and as an Affirmative Defense that:

‘At the time of the commencement of work Plaintiff agreed with the Defendants Local 839 and 370 that said Hanford Contract should apply to said job until completed and although termination notice of said Contract was made on December 29th the terms of said Contract were applied until after March 20, 1956.’

the Court finds with respect to said Affirmative Defense that no part thereof was established by the evidence introduced in this cause and further specifically finds that there was no Agreement made as pleaded and that any statement or statements claimed by witnesses for the Defendants to have been made by Lee E. Knack, Manager of Labor Relations for Plaintiff, at a meeting held in Pasco, Washington, on January 5, 1956, were not made as a contractual commitment on behalf of Plaintiff to any party to this action, or were said statement or statements, if any, in any manner relied upon by the Defendants or their membership.”

As will be seen by the foregoing Finding of Fact, the Appellants are seeking by this Specification of Error to raise a controversial issue of fact. In this attempt they are first faced by the provisions of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A. reading as follows:

“Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or re-

fusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * ”

As stated by this court in *Bjornson v. Alaska S.S. Co.* (9th Cir. 1951) 193 F.(2d) 433:

“It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence. * * * ”

These same views were reiterated by the Court in *Game-well Company v. City of Phoenix*, 216 F.(2d) 928 and *Carr v. Yokohama Specie Bank, Limited*, 200 F.(2d) 251. There are many similar authorities from this and other Circuits to the same effect.

The attention of the Court is also directed to the fact the claim and contention of Appellants is a direct contradiction of their Answer to Appellee's Requests for Admissions whereby Appellants answered (Tr. 88, 231):

“Request 13—Answering Request 13 defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 839; Joint Council of Teamsters No. 28 and Western Conference of Teamsters admit that the contract in force prior to January 1, 1956, and applicable to the Hanford area, was cancelled as of December 31, 1955, by notice given by Hanford Contractors Negotiating Committee through Kenneth M. McCaffree, its executive secretary, *and that no substitute contract became effective relative to said area between January 1, 1956, and the date of the*

work stoppage, referred to in plaintiff's amended Complaint, and these defendants deny that the contract attached to plaintiff's amended complaint as Exhibit "A" had or has any application to work to be performed within the Hanford area." (Emphasis supplied).

Before the testimony upon which Appellants rely and as related "in abstract" in Appendix IV was admitted in evidence Appellee objected thereto upon the ground that the claim and contention of Appellants constituted an affirmative defense not pleaded (Tr. 226, 227, 233, 294) and such objection was saved and preserved by a continuing objection (Tr. 236). It is submitted this objection was proper, the overruling thereof was error and this Court should not consider any contention of Appellants based thereon.

It further appears that Appellants are now seeking to use the testimony for purposes other than that for which it was admitted by the Court over Appellee's objection. The Court stated as the basis for its ruling (Tr. 236) :

"THE COURT: Well I think that counsel will be permitted to show, if he can, or inquire at least along the line of showing that this contract which, or these contracts, rather, which are in evidence as Plaintiff's 2 and 3, were not actually used or applied to Hanford Works which is the basis of this suit."

The contention of Appellants, as stated at page 88 of their Brief, that:

"At the Pasco meeting in the afternoon Mr. Knack definitely committed the Appellee to a continuance of isolation pay and bus transportation"

is hardly consistent with the ruling of the Court that the evidence might be received to show that Exhibits 2 and 3 “were not actually used or applied to Hanford Works.”

Lastly and as a conclusive answer to Appellants’ contention and claim and as found by the Trial Court, the testimony does not support Appellants or contradict the Finding of the Trial Court.

We can see no benefit in attempting to point out the many particulars in which Appellants’ Appendix IV, which purports to be an ABSTRACT OF EVIDENCE CONCERNING COMMITMENT TO CONTINUE ISOLATION PAY AND BUS TRANSPORTATION MADE BY LEE J. KNACK, APPELLEE’S DIRECTOR OF LABOR RELATIONS AT PRE-JOB CONFERENCE HELD AT PASCO ON JANUARY 5, 1956, is inaccurate and incomplete. It is sufficient to direct the attention of the Court to the fact it is incomplete in at least two most important particulars.

Appellants seek to claim a “commitment” as the result of a question asked Mr. Knack by one Charles J. Knapp. Mr. Knapp was, at the time in question, Union representative for Plasterers and Cement Finishers (Tr. 470). He was also Secretary of the Pasco-Kenne-
wick Building Trades Council. Although he testified that he had been selected as spokesman for the Teamsters, Operating Engineers and Cement Finishers (Tr. 482) he admitted that this agency had not been disclosed to Mr. Knack (Tr. 526, 527) and that there were present at the meeting Mr. William H. Dunn and Mr. Rossman of the Operating Engineers (Tr. 524) and possibly a representative of the Teamsters (Tr. 524). Further, and

although Mr. Knapp testified voluntarily and directly upon his direct examination that his inquiry of Mr. Knack was “after the general meeting” (Tr. 479) and that his inquiry was “for the people that I represented” (Tr. 479), he did not assert that he was representing the Teamsters and Operating Engineers until an objection had been made in his presence as to the binding effect of his testimony as between Appellee and Appellants (Tr. 480) and on cross-examination, when it appeared his inquiry had not been a part of the general meeting, he endeavored to change his testimony as follows (Tr. 525):

“Q. Now, when you originally testified on this matter, Mr. Knapp, did you state that this meeting or the discussion with Mr. Knack was after the general meeting?

A. I did say that and I should have described it in a different way. The general discussion or the pre-job conference, that business was over and then that is when I approached Mr. Knack with the questions in reference to isolation pay and bus transportation.

Q. As a matter of fact, you didn’t correct your testimony in that respect until after I had made an objection, isn’t that true, pointing out that you had stated that the conversation was after the general meeting?

A. The meaning was the same, but the words that I used were wrong, sir. It doesn’t change the fact of when it actually happened.”

The unreliability of the witness and his self interest was apparent to the Trial Judge.

Of paramount importance, however, was the testi-

mony of Mr. Knapp that Mr. Knack made no “commitment” as to how long Appellee would pay isolation pay and furnish bus transportation (Tr. 527, 528).

The testimony of Mr. Lee E. Knack concerning the pre-job conference of January 5, 1956, is to be found in its entirety upon pages 240-246, 270-283, 294-296, 700-718, of the Transcript. That of William H. Dunn appears at pages 556-560, 562-566. Mr. Arthur A. Rossman’s version appears at pages 612-616, 621-622. One Harold Edward Clary presented his version at pages 670-672 of the Transcript. Rather than presenting our own “abstract” of such testimony, as counsel for Appellants have attempted to do in Appendix IV, we prefer to let the Court read the actual statements of the witnesses in the light of the Trial Court’s comments thereon, as follows (Tr. 782-784):

“Now, certainly the burden, whether it is strictly affirmative defense—I think it is, and it has been pleaded as an affirmative defense—but certainly the burden would be upon the defendants to show that there was another contract and necessarily, under the proof here, a subsequent oral contract.

Now, what oral contract was there that superseded or modified or changed this written contract which the Court has held by its terms applied to all of Benton County? The only possible one that I can see here would be the oral contract made by the announcement of Mr. Knack at the afternoon meeting of January 5, 1956.

Now, it seems to me that for a court to hold, that under the circumstances there, with the background, and considering the relation of the parties and what they are doing, what they were attempting

to do, it would be extremely unrealistic for a court to say that that was a contract to govern the terms and conditions of labor of these unions on a million, eight hundred thousand dollar construction job.

The statement wasn't even made in response to any question asked by any representative of these defendant unions. Mr. Knapp, who asked the question, and it was, the evidence shows, almost an afterthought, the question was asked toward the close of the meeting after most of the discussion had terminated, Mr. Knapp, who doesn't represent either of these unions here, defendant unions, asked this question and got the answer in response. It doesn't seem to me that the Court could logically hold that these experienced business representatives of these unions, who certainly are capable, knew what they were doing, would rely upon a statement made in response to a question asked by somebody else, an oral statement made, as governing the terms and conditions of their members' work on this big contract. Certainly, they would have said, 'Well, does that apply to my union? Will you give us a letter of confirmation on this so that we will be in accordance with the terms of the Taft-Hartley Act as to health and welfare payments and contributions?'

It just seems to me that the parties would not and, as a matter of fact, I think the situation is clearly here that they were not, relying upon that oral contract. They weren't there to make an oral contract; they weren't relying upon it. Their position was and has been that the written A.G.C. contract didn't apply to this job on the Hanford area. That is what the union members thought, that was their position, and that was counsel's position, and, unfortunately, the Court has taken a different view and deprived them of that defense.

Now, it logically follows, of course, that if there was no modifying contract, then this contract did apply and was breached by the unions in failing to abide by the grievance procedures which were outlined in the contract.”

A further significant fact is that Mr. Arthur A. Rossman, Business Agent for Appellant Operating Engineers, testified as follows (Tr. 647) :

“Q. Are you relying on the statements made by Mr. McCaffree in his letter of December 29th, which terminated the Hanford Works Agreement, or are you relying on the statement which you say Mr. Knack made in the January 5th meeting?

A. Neither one of them.

Q. Neither one of them? A. No.”

Specification of Error III-B is without merit for the reasons, first, the claimed “commitment” is contradictory of Appellants’ admission that “no substitute contract became effective relative to said area between January 1, 1956, and the date of the work stoppage”; second, all testimony in support of the “commitment” was erroneously admitted by the Trial Court over the preserved objections of Appellee that no such defense was pleaded, and that it violated and was contradictory of Appellants’ Answer to Request for Admission; third, the Findings of the Trial Court are not shown to be erroneous under Rule 52 of this Court heretofore quoted; and fourth, the alleged “commitment” was not established in fact or relied upon by Appellants.

SPECIFICATION OF ERROR III-C

By this Specification Appellants make the unique

argument that it was Appellee which breached the Labor Contracts rather than they.

We say the argument is “unique” because it was presented for the first time by APPELLANTS’ POINTS ON APPEAL. There was no pleading presented to the Trial Court tendering the issue, or was there proposed by Appellants any Finding of Fact or Conclusion of Law in support of such contention. The matter stands therefore in the category of a defense raised for the first time in the Appellate Court.

Under the Federal Rules of Civil Procedure, Rule 12(h) (28 USCA) it has been uniformly held by this Court, as well as by the Courts of other Districts, that it is not permissible for an Appellant to rely upon an Assignment of Error not called to the attention of the Trial Court where the matter does not concern the jurisdiction of the Court. *Century Furniture Co. v. Bernhard’s, Inc.* (USCA 9th) 82 F.(2d) 706; *Maloney v. Brandt*, (USCA 7th) 123 F.(2d) 779; *Sorenson v. United States*, (USCA 9th) 226 F.(2d) 460.

Even though it be conceded, however, that Appellants are entitled to raise such an issue as a defense in this Court for the first time, the point is without merit or substance under the facts as established by the record.

The testimony is quite clear and emphatic that at all times up to and including the trial of this action upon the issue of liability Appellants refused to recognize that Exhibits 2 and 3 were in any respect applicable to the Hanford Works Area. The pleadings are likewise in accordance with this position and contention of the Ap-

pellants and Appellants have based their appeal to this Court largely upon the same claim and contention.

It is ridiculous to assume that under such conditions any offer to arbitrate by Appellee would have been given favorable consideration.

It is not necessary, however, to rely upon assumptions. Mr. Sam C. Guess, Executive Secretary of the Spokane Chapter of Associated General Contractors of America, Inc., testified that at a meeting held at Spokane, Washington on March 16, 1956, in the Federal Court House, the following occurred (Tr. 333-337) :

“Q. All right, what did you do in a further endeavor to reach some agreement, and again I am referring to only direct contacts had by you with the two unions with which we are interested, the Teamsters and the Operating Engineers or their representatives?

A. We offered to arbitrate under the disputes clause of the agreements reached in Exhibits 2 and 3, and we were told that the members present could not give us an answer at that time.

Q. Now, let's find out what meeting that was that offer was made and who were present, if possible?

A. That offer was made on March 16th, at which time Mr. Al Crowder of the Teamsters, Mr. Sewell Davis of the Teamsters, Arthur Rossman of the Engineers, R. Davis of the Engineers, B. C. Fulton of the Engineers, William Dunn of the Engineers, R. L. Hollingsworth, Engineers; Charlie Knapp, Cement Masons; Max Sather, Carl Carbon, George Sebeck, Al Halvorson, Cham Helvey, Sam Guess, and Mr. Mack Reynolds for management, and Mr. McCaffree—he was the Executive Secretary—Mr.

Bacon, Mr. Rutt, Messrs. Peterson and Zeman of the Federal Mediation and Conciliation Service.

Q. You say that was an offer to arbitrate?

A. That was an offer to arbitrate.

Q. And what response, if any, did you get to that offer?

A. We were told by Mr. Davis of the Teamsters that he would have to clear through his legal department in Seattle before he could go further on arbitration.

We were told by Mr. Rossman that he wanted an opportunity to consult legal counsel.”

* * *

“Q. Now, at some later date, did you receive a definite word from either of these gentlemen or from representatives of their organizations as to the request that they arbitrate under the arbitration provisions of the A.G.C. agreements?

A. On March the 21st, another meeting in mediation, attended by both Mr. Peterson and Mr. Zeman, Mr. Zeman doing most of the mediation, was held, and at that time Mr. Rossman of the Engineers, Mr. Bill Dunn, Mr. Sewell Davis, Mr. Charlie Knapp, were present. Management was represented by Mr. Sather, Mr. Helvey, Mr. Carbon, Mr. McReynolds, and Mr. Guess.

Q. What occurred at that time?

A. Mr. Davis stated that he had not been able to talk to his attorney, Mr. Sam Bassett, and that they had talked to one of the assistants, and the Teamsters refused to arbitrate the issues at Hanford because of several reasons. He stated one of the reasons was that it was doubtful that it is legal for a new agreement to be arbitrated.

Mr. Rossman stated that he had thoroughly talked it over with his attorney and, because management had transferred their bargaining rights, it did not necessarily establish the Area agreement on the project, and since the Hanford contractors have negotiated the area agreements for a number of years, he felt that they should continue to do so, although in the face of admitting that the Hanford Area agreement had been cancelled.

Q. Well, now, after the refusal of both the unions to arbitrate as to some arrangement, what was done?

A. A great deal of discussion took place during the remainder of the morning and, after a caucus or luncheon break, the full meeting resumed and the chairman of the Spokane Chapter, Mr. Sather, stated that he felt that we had made labor a fair proposition and that they should take the matter back to their people and they should go to the A.G.C. agreements and arbitrate their grievances, with the understanding that any benefits given by the arbitrator would be retroactive to the time that the arbitration began. Mr. Rossman stated of necessity he must take it back to his people, and Mr. Davis stated that, 'I think you have a work stoppage on your hands. Our people will not work.'

And it was again asked that if they didn't think it was a fair thing, to arbitrate the matter, and Mr. Davis answered, 'No, that would be the simplest thing in the world to me.' These people told us that they are just not going out there when the busses are off.' And it was after that that the meeting was adjourned. Mr. Zeman made the closing remarks, a very brief summary, and the meeting came to a complete impasse and was adjourned.

Q. Was anything said at that meeting as to when

the absolute terms of the A.G.C. agreement would be made effective there?

A. It was stated several times during the meeting that there was no other agreement under which people could work; that a considerable number of the local unions had gone under Area agreements, the Hanford Works Agreement had been terminated, and for that reason they would either work under the A.G.C. agreement or there was no agreement to work under, * * *

Q. What occurred there then after this meeting? You say that the meeting of March 21st ended in an impasse; what occurred then?

A. There were no busses on the job the next day, and, to my knowledge, no one but—well, the crafts involved did not work, Mr. DeGarmo. I understand that through telephone conversations with the area, with Mr. Thurston of the A.E.C. and with the project manager on the job.”

See also pages 396-397 of the Transcript where Mr. Guess further testified:

“Now, in your testimony yesterday you mentioned some offer to arbitrate or mediate this matter of the dispute?

A. We did, sir.

Q. And was that under the agreement of Article 9 as far as the Teamsters' contract was concerned?

A. Yes, sir, and under Article 10 of the Engineers' agreement.

Q. There is a similar provision in the Engineers' agreement, which is Exhibit 3?

A. That is correct.

Q. And what happened with respect to that offer?

A. We were told by Mr. Sewell Davis of the Teamsters that they would not arbitrate. We were also told by Mr. Rossman that he could not arbitrate.”

The law is quite clear that a party will never be required to perform a useless act to comply with some alleged condition to suit. 1 C.J.S. 1070 §27(5)d.; 1 Am. Jur. 428 §36.

Here the record is clear and unequivocal that there was made a definite offer of arbitration to Appellants which was considered by them and rejected.

Appellants have endeavored to assert that the work stoppage resulted from a “lockout” because of the failure of Appellee to furnish free bus transportation to Appellants’ members on March 23, 1956. We believe it should be stressed at this point that the furnishing of bus transportation had never been a contractual responsibility of any employer at Hanford Works Project. This fact was agreed upon by all witnesses: SAM C. GUESS (Tr. 319), CHARLES J. KNAPP (Tr. 520), WILLIAM H. DUNN (Tr. 562).

In the light of such testimony, it is submitted the discontinuance of a non-contractual and voluntary service could hardly be claimed as the basis of a “lockout” where it was admitted the workmen could have driven to work in their own cars, as many of them had done prior to the discontinuance of the bus service on March 22, 1956 (Tr. 426).

The temper and attitude of the Appellant Unions was well stated by Mr. Rossman as follows (Tr. 653):

“Q. Well, you were insisting that all the terms

and provisions of the Hanford Agreement were in effect. Were you also recognizing the grievance and arbitration procedures, if such there be, under the Hanford Works Agreement, or did you just want the good part and leave the bad out?

A. I repeatedly stated that I couldn't agree to any settlement that would provide for a cut in take-home pay for my members employed on that project.

Q. You made that statement repeatedly, didn't you ?

A. Many times.

Q. That regardless of what the contract said, you weren't going to take any cut in pay?

A. That's right."

In connection with this Specification of Error, it is interesting to note that Appellant Teamsters' counsel, Mr. Carey, by his answer to a question of the Court, recognized the work stoppage as a strike and not a "lockout" (Tr. 296) :

"MR. CAREY: Prior to the beginning of the strike on March 22nd. The strike started on March 22nd."

It is also of interest to note the signs carried by the pickets did not indicate a lockout, but rather a strike by their language (Tr. 410) :

"A. Oh, it said 'Hanford Contractors Unfair to Teamsters Union,' such and such, 'Operators Union' number such and such, and 'Cement Finishers.' It may not have been in that order."

In the light of all of the foregoing, it is submitted Specification of Error III-C is entirely without merit and not worthy of consideration.

SPECIFICATION OF ERROR IV

By this Specification of Error, the Appellants object to the form of the Judgment against them as being “joint and several.”

The answer to this contention is that the Judgment as finally entered and as appealed from does not so provide. Rather, it reads (Tr. 173-174):

“It Is Further Ordered, Adjudged and Decreed that the last paragraph of the Judgment entered herein April 14, 1958, be, and the same is hereby amended and changed to read as follows:

“ ‘It Is Further Ordered, Adjudged and Decreed, that Morrison-Knudsen Company, Inc., a corporation, plaintiff herein, is hereby granted judgment against each of said defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, in the sum of \$147,284.41, together with interest thereon at the rate of 6% per annum from the date of entry of this judgment until paid, together with costs and disbursements of plaintiff to be taxed against each of said defendants in the manner as provided by law. It Is Further Ordered that the satisfaction of said judgment against either defendant shall automatically operate as a *pro tanto* satisfaction of the judgment against the other defendant, to the end that plaintiff shall in no event collect from said defendants, either individually or jointly, more than the total amount of the judgment, interest, and costs as aforesaid.’ ”

Next, the Appellants argue that the Judgment as above set forth is improper for the reason that there was no segregation of or basis for the segregation between

them of the damages sustained by Appellee by reason of the simultaneous and illegal strike of Appellants. It is submitted under the facts and evidence of this case, not only is no such segregation necessary but any such attempt at segregation would be improper.

Upon the termination of the Hanford Works Agreement on December 31, 1955, Appellants each took the position that the Area Agreements negotiated prior thereto and dated December 19, 1955 (Ex. 2) and December 24, 1955 (Ex. 3) respectively, did not cover and were not applicable to the Hanford Works Area (Tr. 331, 332). They each refused to submit the matters in dispute to arbitration as provided for by the Area Agreements, Exhibits 2 and 3 (Tr. 335). At the meeting of March 16, 1956, the Appellants affirmed that their members would not go to work if the busses were taken off (Tr. 336, 342, 343). When the busses were not furnished on March 22, 1956, Appellants made good on their threats, and the work stoppage occurred (Tr. 343). The establishment of pickets on April 5, 1956 was jointly by the Teamsters, Operating Engineers and Cement Finishers (Tr. 410). The record is uniform in establishing that in all acts leading up to, during and continuing to and including the end of the strike, the Appellants acted in concert and jointly. Based upon such undisputed facts, the Court found as Finding of Fact VII (Tr. 134, 135):

“That upon the termination of the Hanford Works Agreement (Defendants’ Exhibit 16), the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370, jointly and severally de-

manded of Plaintiff, through its authorized bargaining agent and representative Associated General Contractors of America, Inc., Spokane Chapter, the continuance of furnishing by Plaintiff of free bus transportation from the North Richland Bus Terminal to the site of the work within the Hanford Atomic Products Operation area for their members employed by Plaintiff, although the furnishing of such free bus transportation had never been a contractual requirement of any Labor Agreement covering the work at Hanford Works, and further demanded the payment to their members employed by Plaintiff of isolation pay, as provided for by the terminated Hanford Works Agreement, and refused to recognize the applicability of the Labor Agreements, Plaintiff's Exhibits 2 and 3, to the work of Plaintiff within the Hanford Works Area for the Atomic Energy Commission although said work was being carried on wholly within Benton County, Washington. Although Plaintiff, through its authorized bargaining agent and representative, Associated General Contractors of America, Inc., Spokane Chapter, offered to submit the applicability of said Labor Agreements, Plaintiff's Exhibits 2 and 3, to the Hanford Works Area and the questions of the furnishing of free bus transportation and of isolation pay for hearing and arbitration in accordance with the grievance machinery, as set forth and established by Article IX of Plaintiff's Exhibit 2 and Article X of Plaintiff's Exhibit 3, the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370 refused to submit such matters under the grievance machinery, as set forth in said Labor Agreements, disclaimed the applicability of Plaintiff's Exhibits 2 and 3 to the work of the Plaintiff within the Han-

ford Works Area and on March 22, 1956, upon the discontinuance by Plaintiff of the furnishing of free bus transportation and of isolation pay to the members of the Defendant Local Unions then in the employ of Plaintiff, said Defendant Teamsters Local No. 839 and Defendant Operating Engineers Local No. 370, acting in concert, caused their respective membership to strike the work of Plaintiff under its Contract, Plaintiff's Exhibit 1, with the Atomic Energy Commission and to cease all work thereon or for Plaintiff and on April 5, 1956, caused the work of Plaintiff to be picketed, which strike and refusal to work continued to and until the 6th day of June, 1956."

Under the circumstances, it must be clear that for all damages sustained by Appellee, each of Appellants was liable to the full extent. There was and is no possible basis to contend that any portion of the damages were more the result of the acts of one Appellant than the other. There was no showing that either Appellant ever elected to or offered to end the strike on its part. In fact the record is to the contrary. There was and is therefore no reason or basis for segregating the damages between the two Appellants. Obviously, Appellee could not be left in the position of collecting its full damages from each of Appellants and the Judgment expressly provides against such contingency.

We have no quarrel with the authorities cited by Appellants under this Specification of Error. It is admitted that the joinder of Appellants in a single action was permissible under applicable Federal Rules of Civil Procedure. The Judgment as entered was and is against each

of the Appellants “according to their respective liabilities,” and is therefore entirely proper.

We cannot leave this point without directing the attention of the Court to the logical, or more properly stated “illogical,” situation which would result if Appellants’ contention were to be sustained. Should this be done, the Court would have placed in the hands of Labor Unions the power to completely render ineffective the provisions of the Taft-Hartley Act giving the employer the right of direct action against Labor Unions for breach of Contract. To eliminate any possible liability for damages for breach of Contract, it would then only be necessary for two Unions to join in a strike or breach of identical provisions of a Contract and then escape liability for damages by the contention that it was not possible to segregate what portion of the damages of the employer were occasioned by the act of one of the collaborating Labor Unions and what portion was caused by the act of the other collaborator. Any such a result would be not only contrary to the clear intent of the Taft-Hartley Act but contrary to all rules of justice.

Specification of Error IV is as much without foundation in fact or law and as without merit as each of the other Specifications of Error relied upon by Appellants.

SPECIFICATION OF ERROR V

Although Appellants, by Specification of Error V, took exception to the damages as awarded by the Court under Items 1, 8, 11, 12 and 16, they have elected to discuss only Items 8, 11, 12 and 16 upon this Appeal. As to these latter Items, they contend the allowances made by

the Court were “excessive and not supported by the evidence.”

Appellants predicate their argument largely upon the novel theory that since Appellee “would have sustained loss on the contract” in any event they are entitled to a free ride and should not have been charged any amount to diminish such loss.

This argument is not only novel and illogical, but also not strictly in accordance with facts.

By Exhibit 1 it was established that Appellee’s Contract with the Atomic Energy Commission called for the performance of the following work at lump sum prices, as follows:

<i>Item No.</i>	<i>Description</i>	<i>Amount</i>
1	Pumping Plant Addition 100-F Area	\$ 908,380.00
2	Pumping Plant Addition 100-H Area	868,800.00
3	Office Addition and Modification of Vent Rooms—100-D Area.....	20,400.00
4	Office Addition and Modification of Vent Rooms—100-D Area.....	20,400.00
5	Office Addition and Modification of Vent Rooms—100-F Area.....	51,600.00
TOTAL.....		\$1,869,580.00

Admittedly these prices covered and included Appellee’s contemplated or anticipated profit on the Project (Tr. 946).

Mr. Ralph Nelson, Office Manager upon the Project, testified that the book loss as of December 31, 1957, was \$322,196.93 (Tr. 942) against which would have to be

offset any recovery received from the Atomic Energy Commission from a claim of \$127,483.55 (Tr. 978) and any recovery from Appellants. Mr. Russell H. Madsen, Assistant Division Manager for Appellee, testified when these two elements were taken into consideration “it would be questionable whether we would be in the black or in the red” (Tr. 1010). Accordingly Appellants’ contention that the Project “would have sustained loss” is not consistent with the facts.

Regardless of the truth or falsity of this contention the argument of Appellants is illogical and unsound. We will demonstrate this fact during the course of the discussion of the separate items to which Appellants take exception.

Item 8—Equipment Rentals—\$18,938.82

As to this item Appellants seek to take advantage of an inter-company charge as made by the District Office of Appellee to each of its Projects for equipment rental instead of the allowance of a fair rental value for the equipment rendered inoperative by the strike as allowed by the Court (See Appellants’ Brief page 62).

While it is conceded the charge made by Appellee to the Project for its own equipment might have some probative value, it could not be controlling of a fair rental value. Obviously the only reason Appellants seek to take advantage of such amount is that it was low and without relation to actual fair rental value. Had the inter-company charge been greater than fair rental value we have no doubt Appellants would be here insisting that fair rental value should govern their liability.

We direct the attention of the Court to Exhibit 29 whereon is listed the equipment made idle by Appellants' wrongful strike. The testimony was that the only charge made by the District Office of Appellee to the Project for the use of this equipment throughout the entire strike period was \$689.35 (Tr. 989, 990) for the reason that no charge was made during this period, except for pickups (Tr. 1019), in order to prevent the management of the Project from losing interest in the work (Tr. 1019).

The fact is the claim of Appellee of \$27,043.13 was based upon AGC and AED rental rates, which the testimony established were accepted as standard in the construction industry. J. P. Finlay (Tr. 983, 984). R. H. Madsen (Tr. 1018). Ramon E. Reed (Tr. 809). Ralph Nelson (Tr. 917-921).

The Trial Court saw fit to reduce the amount of the claim of Appellant under this item to \$18,938.82 consistent with the holding in *Brand Inv. Co. v. United States*, 58 F.Supp. 749, 102 Ct. Cl. 853, Certiorari denied, 324 U.S. 850, 89 L.ed. 1410, where the Court stated:

“(4, 5) The other disputed element of damage is the rental value of machines and equipment which the plaintiff had on the job, and which were necessarily kept idle during the period of the stop order. The plaintiff proved that machines of this type had a certain rental value. The Government urges that the plaintiff was not in the business of renting machines to others; that it would, probably, not have rented them even if they had not been tied up on this job by the indefiniteness of the duration of the stop order; that it has not shown that it had any

other job on which it could have used them itself if they had not been tied to this job.

We think that the plaintiff is entitled to recover on this item of its claim. We do not allow the full amount of the rental value, since we recognize that, if rented, the machines would have suffered wear and tear which they did not suffer while idle on this job. But when the Government, in breach of its contract, in effect condemns a contractor's valuable and useful machines to a period of idleness and uselessness, we think that it should make compensation comparable to what would be required if it took the machines for use for a temporary period, but did not in fact use them."

The finding of the Trial Court as to the amount of damages sustained by the Appellee for the loss of use of its equipment is in accordance with law and established facts of this case and should be sustained.

**Item 12 — General Administrative Expense —
\$17,331.30**

In *Brand Inv. Co. v. United States*, 58 F.Supp. 749, 102 Ct. Cl. 853, heretofore mentioned, the Court also had occasion to comment upon the recovery of General Administrative Expense in a situation such as here exists stating:

"(2, 3) We are allowing the plaintiff a proportionate part of its main office overhead. While such an element of damage can never be proved with mathematical precision, it is standard accounting practice to attribute main office expense to various company operations on some fair basis and we follow that practice."

The accounting and factual basis for Item 12 was

testified to by Ramon E. Reed, Project Manager for Appellee (Tr. 814-817). He stated the item was to cover the expense of the Home Office at Boise, Idaho and the District Office at Seattle, Washington, and that in practice each Project of Appellee is charged 3% upon the entire job revenue to cover such General Administrative Expenses (Tr. 815-816). To arrive at a basis for the claim in this case the originally scheduled revenue of \$702,380.00 for the months of April, May and June was used and there was deducted therefrom \$104,972.00 as the actual revenue received during the period and the remainder of \$597,608.00 was divided by the 91 days in April, May and June to arrive at a daily average loss of revenue of \$6,550.00. This figure was then multiplied by the 98 days' delay to the progress of the work attributable to the strike and in turn the product was multiplied by 3% to produce the General Administrative Expense charge for the period of 98 days (See Exhibit 30).

Appellants' Auditor, George E. King, admitted that General Administrative Expense must be allocated upon some formula (Tr. 1091, 1092).

The gravamen of Appellants' complaint seems to be that the Court adopted Appellee's formula that the General Administrative Expense should be computed upon the basis of "average daily scheduled revenue" rather than the formula contended for by Appellants of a computed "average daily basis" from actual revenue received.

The first answer to Appellants' contention is that their own Auditor, George E. King, admitted his computation was not consistent with fact (Tr. 1105):

“Q. Yes, but it was not received on an average daily basis, was it, it was received on an actual basis of progress which was not average at all, that is correct, isn't it? A. That is right.”

The second answer is that to adopt Appellants' theory and that espoused by their Auditor, George E. King, would be to permit Appellants to profit from their own wrong. Since it was admitted revenue was entirely dependent upon job progress (Tr. 1105) and all progress was stopped by the strike, which also stopped revenue, the logic of Appellants' contention would be to deny that Administrative Expense continued during the strike period since there would be no actual revenue received upon which to compute a percentage for General Administrative Expense purposes. The argument falls of its own weight.

Appellants concede the rule of law that an action for the recovery of damages does not fail merely because the amount of damages sustained is incapable of exact measurement. *Ball v. Stokely Foods, Inc.*, 37 Wn.(2d) 79, 221 P.(2d) 832; *Dunseath v. Hallauer*, 41 Wn.(2d) 895, 253 P.(2d) 408; *Gaasland Co. v. Hyak Lbr. Etc.*, 42 Wn.(2d) 705, 257 P.(2d) 784; *Sund v. Keating*, 43 Wn.(2d) 36, 259 P.(2d) 1113; *Gilmartin v. Stevens Inv. Co.*, 43 Wn.(2d) 289, 261 P.(2d) 73, and *Hartman v. Anderson*, 49 Wn.(2d) 154, 298 P.(2d) 1103.

Here the Appellee presented to the Trial Court a fair and equitable method of and basis for computation of General Administrative Expense and it was adopted by the Trial Court. The Specification of Error as to this item is without merit.

**Item 16 — Efficiency Loss for Labor and Extra Cost
Materials — \$75,933.89**

To demonstrate and establish the loss resulting to Appellee from the enforced shut down of operations occasioned by the strike the Appellee, through Exhibit 33 and testimony in support thereof, computed the labor cost per cubic yard of concrete prior to the strike and after the strike and claimed the difference by way of damages.

The reasons for the excess labor costs after the strike were testified to by Ramon E. Reed, Project Manager for Appellee. He stated that upon starting up a job it takes several days for new men to get to working as a unit even though experts in their crafts. He compared a concrete crew to an All American football team and explained that it takes time for such a group to form a championship outfit (Tr. 823). He further stated that at the time of the strike the crews were trained and the initial lag had been overcome, but it was found impossible after the strike to secure the return of the same workmen (Tr. 804, 805). The best carpenters were not available and the majority of them had found work elsewhere and as a result a poor group of carpenters were on the Project subsequent to the strike (Tr. 806, 825). Mr. Reed further stated that due to the delay in the work caused by the strike the Atomic Energy Commission put pressure upon Appellee, which necessitated the employment of additional help to get the work back on schedule (Tr. 825). All of these factors served to increase the cost and in Area 100-F where the labor costs prior to the strike had been \$28.41 per cubic yard it rose to \$39.71 per

cubic yard after the strike. Similarly where the labor cost prior to the strike in 100-H Area had been \$20.91 per cubic yard it rose to \$42.92 subsequent to the strike (Ex. 33). These differences accounted for \$67,288.91 additional labor costs to Appellee upon concrete alone after June 6, 1956, when work was resumed (Ex. 33).

But labor costs were not the only item of additional expense resulting from the strike. The cost of materials was also increased. Mr. Reed stated this increase was occasioned in part by inability to reuse forms as would have been possible and as had been anticipated except for the strike and the resulting necessity to speed up the work to meet demands of the Atomic Energy Commission (Tr. 818). The increase in cost was further occasioned by the necessity for building additional forms out of plywood instead of using patented forms (Tr. 825) and by the loss of forms and materials due to drying out and warping during the strike shut down (Tr. 826).

To reflect these additional material costs there was contrasted on Exhibit 33 the estimated material cost per cubic yard with the actual cost and it was found that this difference was \$22,082.07.

Thus the total excess labor and material costs as claimed by Appellee and as supported by the evidence attributable to the strike was \$89,370.98, upon which the Trial Court, for reasons best known to it, allowed \$73,933.80.

It is submitted the method of computing damages as employed by Appellee was fair and equitable and that the allowance made by the Court was well within the evi-

dence. Accordingly the Specification of Error as to this item is without merit.

Item 11 — Loss of Profits — \$5,936.29

After determining the specific items of damage sustained by Appellee the Court, by Supplemental Findings of Fact I (Tr. 143), found:

“and that Plaintiff is further entitled to an allowance upon said direct cost, expense and damage Items 1, 2, 8, 10, 12, 15 and 17, totaling \$59,362.95 of a reasonable markup or profit of 10% or—\$5,936.29.”

By this Finding the Court allowed Appellee only reimbursement for direct expense incurred, except as to (1) Overhead Salaries, (2) Office Rent, Furnishings and Engineering Equipment, (8) Equipment Rentals, (10) Interest on Invested Capital, (12) General Administrative Expense, (15) Extended Time Maintaining General Electric Company Offices and (17) Status Quo Transportation and Isolation Pay.

As previously stated, the complaint of Appellants as to this allowance is that since Appellee had been forced into a loss position on the contract with the Atomic Energy Commission (Ex. 1) Appellee was entitled to no allowance for profit as a part of damages sustained by it upon the direct expense to which it had been subjected by the wrongful act of Appellants. We regard this contention as a *non sequitur*.

Even if it be conceded that Appellee sustained a loss upon the over-all performance of the entire Atomic Energy Commission Contract, it does not follow that each and every part of the work was performed without

profit. It was explained by Mr. Madsen that \$127,483.55 of the apparent loss was occasioned by an error in the bid of the University Plumbing & Heating Company, as a Subcontractor (Tr. 1040-1042). The claimed loss due to the acts of Appellants and which Appellee was able to itemize and support by direct proof was \$182,515.77 (Ex. 49), upon which the Court allowed only \$147,284.41 (Tr. 143). These two items account for approximately \$300,000.00 of the loss which was reflected by the books as of December 31, 1957, and who is to dispute that had it not been for the unlawful and wrongful acts of Appellants the Appellee would have made a profit upon the Project, rather than have sustained a loss.

Here Ralph Nelson, Project Office Manager, testified that the normal mark up of direct costs in the construction industry is 15% for overhead and 10% for profit (Tr. 938). Russell H. Madsen testified to the same effect (Tr. 1030). He further testified that such an allowance for overhead and profit is generally accepted as proper on extra work performed for Governmental Agencies such as the Army, Navy, Air Force, Atomic Energy Commission and Bureau of Reclamation (Tr. 1030) and that such an allowance was actually received upon extra work performed for the Atomic Energy Commission under Exhibit 1 (Tr. 1030). Accordingly the allowance by the Court was not a fanciful or unsupported figure, but one based upon uncontradicted testimony and supported by custom and practice in the construction industry.

The Specification of Error as to this item is without

merit and the allowance of the Trial Court for damages should be sustained.

When considered in the light of the evidence and the facts, it is respectfully submitted that the allowances for damages, as made by the Trial Court, were proper, are fully supported by the evidence and that the entire Specification of Error V is without substantial foundation or merit. The award of damages in the amount of \$147,284.41 should be sustained and affirmed.

SPECIFICATIONS OF ERROR VII, VIII, AND IX

As indicated by Appellants' Brief, these Specifications of Error relate to the refusal of the Trial Court to accept the proposed Findings of Fact and Conclusions of Law offered by Appellants which would have required exactly the opposite result from that found by the Trial Court.

For the reason that the argument presented upon the other Specifications of Error completely cover the points as raised by the proposed Findings and Conclusions, we do not deem it necessary to deal separately with Specifications of Error VII, VIII and IX.

CONCLUSION

Each of the Specifications of Error as asserted by Appellants has been shown to be without merit or legal support.

The Findings of the Trial Court disposed of each factual issue as presented by Appellants favorable to Appellee and not only have Appellants been unable to point out wherein such Findings are unsupported by the evi-

dence but Appellee has demonstrated, by reference to the record, that such Findings are consistent with the evidence and overwhelmingly supported thereby.

Notwithstanding all of Appellants' attempts to avoid the impact of the Judgment in this case there stand out as irrefutable facts the following :

Appellants each had binding Contracts with Appellee made through the agency of The Associated General Contractors of America, Inc., Spokane Chapter, expressly and specifically covering all work within Benton, Franklin, Grant and Yakima Counties of the State of Washington, wherein lay the Hanford Works Area.

Appellants refused to honor such Contracts as applicable to the work of Appellee within the Hanford Works Area because they did not provide for "isolation pay" and "bus transportation," although bus transportation had never been a contractual obligation of Appellee or any other employer, and to enforce their unlawful demands struck the work of Appellee in violation of their contractual agreements that "there shall be no strikes."

By reason of the strike of Appellants' members the work of Appellee was brought to a standstill from March 22, 1956, to June 6, 1956, resulting in damages, as claimed by Appellee at time of trial of \$182,515.77, and as allowed by the Trial Court of \$147,284.41. These damages were well and adequately supported and substantiated by the evidence.

To evade responsibility for all of the foregoing Appellants are urging this Court to declare, as a matter of law, that the entire Hanford Works Area (some 400,000

acres of land) is not and never has been, since the condemnation proceedings by the United States in 1943, a part of the State of Washington. This is notwithstanding the specific refusal and declination of the United States to accept any jurisdiction over the area and the continuous exercise of jurisdiction over the area by the State of Washington in all particulars, except as to the right to tax the property of the United States. Not only is the argument and contention of Appellants without factual or legal support, but it lacks one further vital factor. The Contracts between Appellants and Appellee (Exhibits 2 and 3) expressly negative the idea that they were entered into with any such distinction, as claimed by Appellants, within the contemplation of the parties.

For all of the reasons as heretofore set forth, the Judgment of the lower Court should be affirmed in all respects.

Respectfully submitted,

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United States Court of Appeals
For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
LOCAL No. 839, and INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL No. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLANTS' REPLY BRIEF

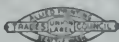
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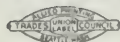
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLANTS' REPLY BRIEF

We undertake the preparation of this Reply Brief with diffidence and humility. This is so because Appellee's counsel throughout their Brief repeatedly have given assurances to the Court that the reasons we have advanced why the judgment should be reversed are entirely without merit or substance. With equal propriety we also might assure the Court that the answers the Appellee's counsel attempt to make are without merit or substance. In that event, one set of assurances would probably cancel the opposing set of assurances and thus leave the Court just where it was in the beginning, to decide for itself who is right and who is wrong. We doubt if the Court will be greatly aided by the

assortment of adjectives the Appellee's counsel uses to indicate their disagreement with us, among which are "ingenious," "technical," "tenuous," "disconnected," "complicated," "unique," "illogical," etc. It should be noted that the Appellee's counsel, at page 2 of their Brief, do admit that our Statement of the Case is reasonably accurate. If there are any inaccuracies, they suggest that the Court is free to search the record for itself and discover some inaccuracies if it can. Whether the bringing of this action amounted to a manifestation of heroic courage on the part of the Appellee or amounted to a dishonorable repudiation of an admitted commitment made by its Director of Labor Relations to the interested Unions at the pre-job conference at Pasco on January 5, 1956, may also justify a difference of opinion.

Although Appellee's counsel purport to separately argue our Assignments of Error I and II concerning the status of the Hanford Atomic Energy Project as a Federal enclave, the fact is that they confuse these two Assignments.

Our Point I concerns the status of the Hanford area as a matter of law. Points II and VI have to do with a related but nevertheless different question and that is what the parties intended when the two labor contracts (Exhibits 2 and 3) were being negotiated. In this Reply Brief we will attempt to keep these two questions distinct.

**APPELLANT'S POINT I CONCERNING STATUS OF
HANFORD ATOMIC ENERGY PROJECT AS A
MATTER OF LAW**

In our Opening Brief (pages 19-33) we referred to Article I, Section 8, of the U.S. Constitution and many decisions concerning lands acquired by the Federal government for national defense purposes. We have not overlooked, as Appellee's counsel seem to think, that the Constitution of the State of Washington provides for such acquisitions and that the Washington statute of 1939 quoted in Appellee's Brief, pages 7 and 9, also relates to that subject. The only section on that statute that has any possible relation to the question now involved is Section 37.04.030 (Appellee's Brief, page 8) by which the state reserves jurisdiction "*not inconsistent with the jurisdiction ceded to the United States.*" The provisions of that statute defining what shall happen if the United States for five consecutive years shall fail to use the acquired lands have no relevancy because there has been no abandonment for five years, or at all.

For reasons which will now be discussed, we believe the Court will be convinced that 40 U.S.C.A., Section 255, quoted in the Appellee's Brief (pages 5-6) can have no application to the Hanford area after December 31, 1946, even conceding for the purposes of argument only that it may have had some possible application before that date while the area remained under the control of the War Department.

The present controversy arose out of two contracts (Exhibits 2 and 3) executed in the month of December,

1955, and in effect beginning on January 1, 1956. The question is: What was the legal status of the Hanford area at that time? The lands constituting the project were acquired by the Federal government beginning in February, 1943, while the war between the United States and Japan was in progress. It is a matter of familiar history that atomic bombs were dropped on several Japanese cities in August, 1945, and shortly thereafter the war with Japan ended when the Japanese surrendered to General MacArthur on August 14, 1945. During the war period, the Hanford project was operated by the War Department. The history of the operation during that period, so far as publicly known, is material to the extent, and only to the extent, that it sheds light on the status of the area after the war had been concluded and after the area was transferred to the Atomic Energy Commission created by the original Atomic Energy Act of 1946. That transfer took place on December 31, 1946, exactly nine years prior to the effective date of the two labor contracts now involved.

The war in the Pacific having ended in August, 1945, Congress a year later passed the original Atomic Energy Act entitled "An Act for the development and control of atomic energy." This Act will be found in Volume 60, United States Statutes at Large at page 755. Section 9(a) of that Act (60 Statutes at Large, page 765) provided that:

"The President shall direct the transfer to the Commission of all interests owned by the United States or any Government agency in the following property:

"(1) All fissionable material; all atomic weapons

and parts thereof; all facilities, equipment, and materials for the processing, production, or utilization of fissionable material or atomic energy; all processes and technical information of any kind, and the source thereof (including data, drawings, specifications, patents, patent applications, and other sources (relating to the processing, production, or utilization of fissionable material or atomic energy; and all contracts, agreements, leases, patents, applications for patents, inventions and discoveries (whether patented or unpatented), and other rights of any kind concerning any such items;

“(2) All facilities, equipment, and materials, devoted primarily to atomic energy research and development; and

“(3) Such other property owned by or in the custody or control of the Manhattan Engineer District or other Government agencies as the President may determine.”

The special Senate Committee on Atomic Energy, in recommending that 1946 Act for passage, explained the purpose of Section 9 as follows:

“The Commission is to take over all the resources of the United States Government devoted to or related to atomic energy development. This includes all atomic weapons, all property of the Manhattan Engineer District, and all patents, materials, plants and facilities, contracts, and information relating primarily to atomic energy. The Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property.”

United States Code Congressional Service,
79th Congress, Second Session, 1946, page
1334.

As directed by that Section 9(a) of the Atomic Energy Act of 1946, the President issued Executive Order No. 9816, dated December 31, 1946, 12 F.R. 37, which so far as now material reads:

“TRANSFER OF PROPERTY AND PERSONNEL TO THE
ATOMIC ENERGY COMMISSION

“By virtue of the authority vested in me by the Constitution and the statutes, including the Atomic Energy Act of 1946, and as President of the United States and Commander in Chief of the Army and the Navy, it is hereby ordered and directed as follows:

“1. There are transferred to the Atomic Energy Commission all interests owned by the United States or any Government agency in the following property:

“(a) All fissionable material; all atomic weapons and parts thereof; *all facilities*, equipment, and materials *for the processing, production, or utilization of fissionable material or atomic energy*; all processes and technical information of any kind, and the source thereof (including data, drawings, specifications, patents, patent applications, and other sources) relating to the processing, production, or utilization of fissionable material or atomic energy; and all contracts, agreements, leases, patents, applications for patents, inventions and discoveries (whether patented or unpatented), and other rights of any kind concerning any such items.

“(b) All facilities, equipment, and materials, devoted primarily to atomic energy research and development.

“2. *There also are transferred to the Atomic*

*Energy Commission all property, real or personal, tangible or intangible, including records, owned by or in the possession, custody or control of the Manhattan Engineer District, War Department, in addition to the property described in paragraph 1 above. Specific items of such property, including records, may be excepted from transfer to the Commission in the following manner * * **

“3. The Atomic Energy Commission shall exercise full jurisdiction over all interests and property transferred to the Commission in paragraphs 1 and 2 above, in accordance with the provisions of the Atomic Energy Act of 1946.” (Emphasis supplied)

42 U.S.C.A., page 192, following Section 2031.

After the passage of the original Atomic Energy Act of 1946, Congress from time to time amended various sections dealing principally with the details of administration, but Section 9(a), pursuant to which the President by his Executive Order No. 9816 transferred the described property from the War Department and vested *full jurisdiction* in the Atomic Energy Commission, remained unchanged.

In 1954 the Atomic Energy Act of 1946 was completely revised by an Act entitled “An Act to amend the Atomic Energy Act of 1946, as amended, and for other purposes.” (Volume 68, United States Statutes at Large, pages 919-961.) This new Act took effect on August 30, 1954. That there might be no misunderstanding as to the continuance of the *full jurisdiction* vested in the Atomic Energy Commission by the President’s Executive Order No. 9816 of December 31, 1946, Congress specifically provided in the revised Act of 1954 that:

“Sec. 241. Transfer of Property.—Nothing in this Act shall be deemed to repeal, modify, amend, or alter the provisions of section 9(a) of the Atomic Energy Act of 1946, as hertofore amended.”

This provision of the 1954 Act now appears as Sec. 2015 of 42 U.S.C.A., page 188.

The Appellee's counsel in their Brief, pages 9-10, direct attention to Exhibit 20 consisting of a series of letters from the War Department to the Governor of Washington relating to the Hanford area while that project was being acquired and was being operated by the War Department and long before the Atomic Energy Commission had been created. The first of these letters dated May 26, 1943, was written three years and seven months before the President's Executive Order No. 9816. The last letter was written on July 31, 1945, one year and five months before the Presidential order. These letters purport to have been written under authority of 40 U.S.C.A., Section 255, quoted in Appellee's Brief at page 5. So far as the Hanford project is concerned, that section ceased to have any vitality whatever after the transfer of the area from the War Department to the Atomic Energy Commission on December 31, 1946. Whatever may have been the dubious status, if it was dubious, of the Hanford area during the war period, there is no possible doubt as to its status after the President, on December 31, 1946, at the specific direction of Congress, transferred the area from the War Department to the newly-created Atomic Energy Commission and vested that Commission with *full jurisdiction*.

The applicable rule of statutory construction is

clearly stated in *United States v. Tynen*, 11 Wall. 88, page 92, 20 L.ed., 153, page 154:

“There is no express repeal of the 13th section of the Act of 1813 declared by the Act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two Acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter Act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two Acts are not in express terms repugnant, *yet if the latter Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act.*” (Emphasis supplied)

The principle of law so clearly stated in the *Tynen* case has been reiterated in *King v. Cornell*, 106 U.S. 395, page 396, 27 L.ed. 60, and in *United States v. Yuginovich*, 256 U.S. 450, page 463, 65 L.ed. 1043, page 1047.

It cannot be gainsaid that the Atomic Energy Act of 1946 and that Act as revised and amended in 1954 “covers the whole subject” and “embraces new provisions” and plainly shows that by those Acts Congress intended the newly-created Atomic Energy Commission to exercise the *full jurisdiction* defined in the President’s Order No. 9816 dated December 31, 1946.

In their Brief, beginning at page 10, Appellee’s counsel state that there are some further facts which they think compel the conclusion that Congress did not mean what it said. Reference is made (Appellee’s Brief, page 11) to some oral testimony of Francis H. Bacom,

a layman and an officer of the Atomic Energy Commission who, at the instance of Appellee's counsel, undertook to give a dissertation on the criminal laws of Washington that were or were not applicable to the Hanford area after the Atomic Energy Commission had assumed full jurisdiction. The extent to which state laws may become applicable to crimes committed within the limits of a Federal enclave is defined by an Act of Congress known as the Assimilated Crimes Act of 1948, 18 U.S.C.A., Section 13, which provides that persons within Federal enclaves who are guilty of acts or omissions which are not punishable under Federal laws but which are punishable under the laws enforced in the state wherein the enclave is located, shall be guilty of a like offense and subject to like penalty. Some difficult questions have arisen as to the proper application of this statute but we are not now dealing with the question of whether such crimes must be prosecuted in the Federal courts or may be prosecuted in state court. What Mr. Bacom, a layman, may or may not think about criminal jurisdiction is decisive of nothing. Neither is it of any consequence whether Mr. Bacom, who had acquired a legal residence in the State of Washington, did or did not vote.

On page 11 of their Brief, Appellee's counsel refer to the contributions made by the Atomic Energy Commission for the maintenance of public schools. On the following page, they refer to the fact that the Washington Workmens' Compensation Act by special arrangements has been made applicable to the Hanford area. These matters are discussed in our Opening Brief at pages 30-32 and do not require further comment.

The matter of health and welfare payments to which counsel refer in their Brief at pages 13-14 is wholly beside the question. Those provisions of the Taft-Hartley Law permit employers to make contributions to health and welfare funds. Those contributions are not made to the Unions; they are made to a trustee. The evidence is specific that in this case the contributions were made not to the Unions, but to a trustee (Rossman Tr. 641, 648, Lewis Tr. 668). In this connection Appellee's counsel cite and quote 29 U.S.C.A., Section 186, but they omit from their quotation sub-section (d) which reads:

“(d) Any person who *willfully* violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.”

If the Appellee, Morrison-Knudsen, *willfully* made payments in violation of the quoted section, and if the trustee *willfully* accepted such payments, it is difficult to understand how their violations can create a contract applicable to the Hanford area if a contract does not otherwise exist. If those payments were not made willfully with intent to violate the regulations relative to health and welfare payments, the fact that they were made by the Appellee and accepted by the trustee proves nothing.

The purport of Appellee's argument on this Assignment is that there can never be a Federal enclave unless the Federal jurisdiction is totally exclusive. That has not been the law from the beginning. The states may and traditionally have reserved authority to serve

criminal and civil process within a Federal enclave. In some cases, as in *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 29 L.ed. 264, certain rights of taxation have been reserved. As stated in the Washington statute, the states with the acquiescence of the Federal government may reserve any jurisdiction “not inconsistent with the jurisdiction ceded to the United States.”

If Appellee’s counsel claim that the change of status resulting from the provisions of the Atomic Energy Act of 1946, the President’s Executive Order No. 9816 of December 31, 1946, and its confirmation by the revised Atomic Energy Act of 1954, is meaningless, on the oral argument they should state so specifically.

REPLY ARGUMENT RE POINTS II AND VI

This subject is discussed in our Opening Brief (pages 33-42) and in the Appellee’s Brief (pages 17-29). The question is: What did the parties mean by the expression “Benton County” in November and December, 1955, when the two labor contracts were negotiated? Did they mean that county as it existed territorially prior to February, 1943, twelve years before the contracts were negotiated, or did they mean Benton County as it existed territorially nine years after it was transferred from the War Department to the Atomic Energy Commission? Appellee’s counsel cite nine decisions from the Supreme Court of Washington to sustain the elementary proposition that when the language of a written contract is plain and unambiguous, oral evidence will not be received to contradict it, and that oral evidence will not be received to create an ambiguity

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This subject is discussed in our Opening Brief (pages 33-42) and in the Appellee’s Brief (pages 17-29). The question is: What did the parties mean by the expression “Benton County” in November and December, 1955, when the two labor contracts were negotiated? Did they mean that county as it existed territorially prior to February, 1943, twelve years before the contracts were negotiated, or did they mean Benton County as it existed territorially nine years after it was transferred from the War Department to the Atomic Energy Commission? Appellee’s counsel cite nine decisions from the Supreme Court of Washington to sustain the elementary proposition that when the language of a written contract is plain and unambiguous, oral evidence will not be received to contradict it, and that oral evidence will not be received to create an ambiguity

where none in fact exists. We, of course, do not dispute that elementary rule of contract law. It is equally well established that when the words used in a contract are capable of one or the other of two possible meanings, the Court must ascertain what the parties intended when the contracts were being negotiated. The question here is which of these two rules is applicable to the case. The repeated assertions of Appellee's counsel that the term "Benton County" as used in the contracts means that county as it existed prior to February, 1943, prove nothing. We believe the authorities we have cited, and particularly *United States v. Bethlehem Steel Company*, 205 U.S. 105, page 117, 51 L.ed. 731, page 736, make it clear that in view of the admitted facts in this case, the parol evidence rule is inapplicable.

On page 3 of their Brief Appellee's counsel quote from a memorandum brief filed in the trial court by the defendants which said, "For legal purposes it (the Hanford area) is no more a part of Benton County than if it were an island of equal size in the Pacific Ocean." That statement was made, and we still adhere to it. It was made at an early stage of the case before the filing of the amended pleadings upon which the case was ultimately tried and neither that statement nor those earlier pleadings are a part of the record before this Court. At that time the comparison of the Hanford area to an island of equal size in the Pacific gave the Appellee's counsel a profound emotional upset from which apparently they have not yet recovered. If it is proper for Appellee's counsel to quote from those early briefs, we assume that it is equally proper for us to do likewise. At that stage of the case, Appellee's counsel in their memorandum brief said:

“At the outset we wish to emphasize the question before the Court for determination is not the extent of jurisdiction between the Federal Government and the State of Washington, or the applicability of State or County legislation to the Hanford Works Project Area, but rather DO THE LABOR AGREEMENTS BETWEEN PLAINTIFF AND DEFENDANTS APPLY TO THE HANFORD WORKS PROJECT AREA? * * *

“Here the question is whether when the parties to the LABOR AGREEMENTS negotiated the same they understood and intended that the Hanford Works Project Area was not intended to be included within the geographical area as described in Article II, since such area was ‘no more a part of Benton County than if it were an island of equal size in the Pacific Ocean’.” (Emphasis supplied by Appellee’s counsel)

At that time, Appellee’s counsel agreed with the very contention we are now making. They have now reversed their position—we have not.

On page 3 of their Brief, Appellee’s counsel state that, “There is not a word of evidence in the record to which Appellants can point to establish that the parties had in mind or contracted in the light of the technical legal point as raised and relied upon by the Appellants.” They make this statement in the face of the fact that upon their motion the Court struck the Appellant’s affirmative defense and excluded Appellant’s evidence.

On page 4 of their Brief, Appellee’s counsel refer to the maps which are attached to the two contracts. If Appellee must refer to a map to aid in ascertaining what the written language means, that in itself is an

admission that the written language is of doubtful meaning and requires explanation.

On page 19 of their Brief, Appellee's counsel refer to a colloquy occurring between Court and counsel after Appellee had made the motion to strike the affirmative defense and before the Court had ruled on that motion. At that time we did say that we were relying upon the affirmative defense as pleaded. We still are relying on it, but we are also relying on that defense as supplemented by the trial amendment allowed by the Court and quoted in our Opening Brief at page 10. Our claim is that when the contracts were being negotiated in November and December, 1955, neither the representatives of the contractors nor the representatives of the Unions were considering the Hanford area at all. In discussing this specification in our Opening Brief, we have pointed out that Mr. Sam C. Guess, the Executive Secretary of the Associated General Contractors, as a witness for the Appellee, never made any claim that the two labor contracts executed on December 19, 1955, and December 24, 1955, and effective on January 1, 1956, as written were intended to be applicable to the Hanford area. His evidence is directly to the contrary. That evidence is that shortly following the pre-job conference on January 5, 1956, the Contractors' Committee proposed that the two contracts be *amended* for the specific purpose of making them applicable to the Hanford area. Those negotiations were continued for a period of several weeks and until March 16, 1956, when the Unions' refusal to agree to an amendment was definitely communicated to the Contractors' Committee. If the contracts as written and in effect on

January 1, 1956, included the Hanford area, why were the contractors so persistently seeking an amendment? The Appellee's Brief is completely silent on this vital question.

In this connection, Appellee's counsel at page 2 and again at page 50 of their Brief quote from the evidence of Mr. Arthur A. Rossman, Business Agent of the Operating Engineers, when he testified that during these negotiations after January 5, 1956, and prior to March 16, 1956, he repeatedly stated that he could not agree to any amendment that would reduce his members' take-home pay. The Appellee's counsel seem to think that there was something reprehensible about the position then taken by Mr. Rossman but that it was commendable for the representatives of the contractors to demand an amendment which, if agreed to, would reduce the take-home pay of the workmen. Why were the contractors seeking an amendment if no amendment was needed?

On page 26 of their Brief, Appellee's counsel quote the provisions of the contracts entitled "Other employees and sub-contractors" and call attention to the provision reading, "There shall be no special job assignments." That reference to special job assignments, of course, refers to special job assignments *within the area covered by the contracts*. If the contracts in their entirety do not include and were not intended to include the Hanford area, obviously that particular provision cannot be given a broader application than the contracts as a whole.

Appellee's counsel make no attempt at all to answer

our Specification of Error VI discussed in the Opening Brief at pages 41 and 42. That assignment has to do with the fact that when the contract (Exhibit 3) between Associated General Contractors and the Operating Engineers Local 370 was being negotiated, Mr. Dewey Murrow was chairman of the Contractors' Negotiating Committee and specifically on November 3, 1955, he stated that they were not then negotiating with respect to the Hanford area at all because the Hanford Works Agreement (Exhibit 6) was still in effect and covered that area.

Under cross-examination by Appellee's counsel, Mr. Rossman stated:

“Q. All right, then, I get back to my first question. What are you relying on?”

A. I am relying on statements made by members of the A.G.C. labor committee during negotiations that we weren't talking about Hanford when we were talking about an area agreement.

Q. Thank you. Now we understand each other.”
(Tr. 647)

Later, when the Appellants offered to prove by Mr. Rossman that Mr. Murrow, Chairman of the Contractors' Committee, did make that statement, an objection by Appellees' counsel was sustained by the Court. The offer of proof made at this time appears in the record at pages 694-695 and reads:

“THE COURT: Yes, I will sustain the objection, but I see no reason why you couldn't make an offer of proof as to what this witness would testify if permitted to do so.

MR. ETTER: From now on, that's right.

THE COURT: Yes.

MR. ETTER: I now offer to prove your Honor, in view of the objection and the Court's ruling, that if the witness were permitted to testify, he would testify as follows:

“That a discussion was held at this particular meeting, referring to November 3rd, 1955, at which the named persons were present in a contract negotiation meeting between the Associated General Contractors and the defendant union Engineers No. 370, and at that time during this discussion there was discussed Article II, Territory and Work Covered, and that the witness would testify that the group indicated that there should be a clarification about a part of Article II with reference to Idaho County, north half, and that likewise during that discussion with respect to that clarification, there was a suggestion for clarification of the relationship of the proposed contract to the Hanford Agreement, and that at that time one of the representatives of the Associated General Contractors, Mr. Dewey Murrow, stated to the Engineers and to those present that the Associated General Contractors were in no wise interested in the Hanford Project and were not negotiating on any conditions for the Hanford contract because it was an old agreement to which different fringe benefits were attached.”

It is difficult to understand how Appellee's counsel can now assert that there is not a word of evidence in the record to show what the parties had in mind (Appellee's Brief, page 3) in the face of the fact that the Appellants offered to make that very proof and were prevented from doing so by Appellee's objection.

In concluding the discussion of this particular point, it is worthy of notice that neither Mr. Sam C. Guess, who executed the two contracts on behalf of Associated General Contractors, nor Mr. Lee Knack, Appellee's Director of Labor Relations, nor anyone else representing the Appellee, claims to have ever discovered prior to April 27, 1956, that the two contracts executed on December 19, 1955, and December 24, 1955, and in effect on January 1, 1956, *as written and without amendment*, had any application to the Hanford area. The work stoppage occurred on March 22, 1956. Thirty-six days later Appellee's counsel wrote the letter now in evidence as Exhibit 50. Mr. Knack testified (Tr. 297-299) that was the first time anyone directly representing the Appellee ever made any claim that the two contracts in question were applicable to work which, since the prior November 28, 1955, was being performed by Appellee under its contract of November 25, 1955 (Exhibit 1) with the Atomic Energy Commission. We find no explanation of this curious circumstance in Appellee's Brief.

REPLY ARGUMENT RE POINT III-A

This Specification of Error is discussed in the Opening Brief (pages 43-46) and in the Appellee's Brief (pages 29-35). We cited *Ketcher v. Sheet Metal Workers*, 115 F.Supp. 802, a decision of the United States District Court for the Eastern District of Arkansas, as authority for the proposition that the Appellee, not having executed either of the contracts, lacks the right to claim damage for their breach. The Appellee cites *Farina Bros. Co. v. United Brotherhood of Carpenters*,

152 F.Supp. 423, a decision of the United States District Court for the Massachusetts District, which is directly to the contrary. So far as our research discloses, there is no Appellate Court decision on the precise point. We do not claim, as Appellee's counsel imply, that a principal can never make a binding contract through an agent or that a contract may not be made for the benefit of a third party. The point of our argument is that, as stated by the trial judge (Tr. 201- 202), proof of membership in the Association was sufficient to justify the admission of the contracts in evidence but some additional proof was essential to show what rights Appellee acquired when it became a member of the Association. No such proof was made. The Finding of Fact quoted in Appellee's Brief, page 32, goes no further than to state that in February, 1955, the Appellee became a member of the Associated General Contractors. There is no Finding as to what rights mere membership conferred. There could be no Finding on that question because no evidence on that question was introduced.

REPLY ARGUMENT RE POINT III-B

This Specification of Error concerns the commitment made by Mr. Lee Knack, Appellee's Director of Labor Relations, at the pre-job conference at Pasco on January 5, 1956, to continue existing working conditions under the Hanford Works Agreement. This question is discussed in the Opening Brief, pages 46-51, with a detailed abstract of the evidence in Appendix IV, Opening Brief, pages 100-116. Appellee's counsel purport to discuss it in their Brief, pages 35-43. The

fact that the commitment was made is not disputed. Mr. Ramon E. Reed, Appellee's Project Manager, testified that he accompanied Mr. Knack to the pre-job conference and remembered that the matter of continuing isolation pay and bus transportation was discussed, although he did not remember the "exact wording" (Tr. 416-417). Charles J. Knapp, a defense witness, both on direct examination (Tr. 479-483) and on cross examination (Tr. 525-529) testified positively that the commitment was made. William H. Dunn, who represented the Operating Engineers Local 370, testified that the commitment was made (Tr. 560). Arthur A. Rossman, business Manager of Operating Engineers Local 370, also testified that the commitment was made (Tr. 621-622). Harold Edward Clary, who represented the Painters Local Union 427 at that pre-job conference, testified that the commitment was made (Tr. 669-671), as did also Lawrence R. King, who represented the Millwrights and Machinery Erectors Local Union 699 (Tr. 672-675). But what is conclusive is that Mr. Knack himself admitted that he did make the commitment, not only to the representatives of the Unions, but also to Mr. Thurston of the Atomic Energy Commission. His evidence on the question appears in detail in the Opening Brief, pages 108-116, and it would serve no purpose to repeat it here, except to again point out that in response to questions propounded to him on cross examination by counsel for Operating Engineers Local 370, Mr. Knack not only admitted that he made the commitment but said, "I didn't qualify it" (Tr. 714-715).

Appellee's counsel attempt to escape the effect of Mr. Knack's admission by calling Mr. Knapp an unre-

liable witness (Appellee's Brief, page 40). If Mr. Knack had denied making the commitment, a question of credibility would have been presented to the trial judge. But he did not deny it. On the contrary, he admitted it, so that the evidence is uniform from the witnesses on both sides that at that meeting Mr. Knack, speaking for the Appellee, agreed to continue the payment of isolation pay and the furnishing of bus transportation as it had been doing from the time it started work on November 28, 1955. Whether the commitment was made at the end of the meeting or at the beginning of the meeting or at some intervening hour or minute is obviously immaterial.

The trial court had no difficulty in disposing of the objection repeatedly made during the trial by Appellee's counsel that the commitment made by Mr. Knack to Mr. Knapp was not repeated to each of the representatives of the dozen or more Unions who were present at that meeting. Mr. Knapp was the spokesman for all and asked the question on behalf of all. In this connection the trial judge said:

“... I assume that the employer is realistic enough to understand that those people are there representing their unions and what is said in behalf of one applies to all of them; ...” (Tr. 618)

Here, as elsewhere in their Brief, Appellee's counsel suggest that the case should now be decided by a critical construction of pleadings rather than on the basis of undisputed facts. This proposal was made to the trial judge repeatedly but he had no difficulty in disposing of it. He said:

“... I think that the issue should be determined upon the evidence rather than upon too critical a construction of the pleadings . . .” (Tr. 377)

and later he said:

“Now, I think that one thing that perhaps impresses me and that is that counsel on both sides, I think, are placing too much emphasis on the pleadings, and I will include in that the interrogatories and the answers. The interrogatories and answers have no higher status than the pleadings in the case, and even though admissions may be made in there, if counsel thinks it is in the interest of his client and in accord with the actual facts and the testimony and the evidence that is to be adduced, he has a right to ask for an amendment, regardless of whether it is consistent with his prior pleadings or consistent with his prior admissions, and the whole spirit of modern trial work, as outlined in the Rules of Civil Procedure, is to have lawsuits tried and decided on the evidence and not on the pleadings, . . .” (Tr. 463)

The trial judge then quoted from Rule 15 of the Rules of Civil Procedure which provides for amendments of pleadings to conform to the evidence. That rule specifically states:

“... but failure so to amend does not affect the result of the trial of these issues.”

The rule further provides that if evidence is objected to on the ground that it is not within the issues made by the pleadings, the Court may grant a continuance to enable the objecting party to meet such evidence. No request for continuance was made by the Appellee. The evidence admitted was, however, within

the trial amendment quoted in the Opening Brief at page 10.

POINT IV RE JOINT AND SEVERAL LIABILITY

This specification of error is discussed in our Opening Brief, pages 51-57, and in the Appellee's Brief, pages 51-55. It should be borne in mind that in this case jurisdiction was invoked solely under Section 301 of the Labor Management Relations Act of 1947 quoted in the Opening Brief at page 2. That section gives the United States District Courts jurisdiction over "suits for violation of contracts between an employer and a labor organization . . . without respect to the amount in controversy or without regard to the citizenship of the parties." That grant of a special contract jurisdiction is so clear that it cannot possibly be construed as conferring any jurisdiction in tort actions.

The Appellee does not pretend to challenge the applicability of the authorities we have cited holding that there can be no joint and several contractual liability in this case, in which the Engineers Local 370 is not a party to the Teamsters' contract (Exhibit 2) and the Teamsters Local 839 is not a party to the Engineers' contract (Exhibit 3). On the contrary, at page 54 of their Brief, they admit that they cannot question the authorities we have cited under this specification of error. Thus they admit that the judgment as originally entered on April 14, 1958 (Tr. 144-148) which by its terms purports to give the Appellee a joint and several judgment for a lump sum against both Unions, is not within the jurisdiction granted by the jurisdictional statute which they invoke. In their Brief, page 51, they

print the amendatory order of May 8, 1958 (Tr. 171-174) but they wholly fail to point out how the substance of that amendatory order differs from the substance of the judgment as originally entered. A judgment awarding a lump sum against two defendants and providing that the plaintiff may collect what it can from one and the deficit, if any, from the other, is a joint and several judgment, whether it is so labeled or not.

They say (Appellee's Brief, page 52) that "The record is uniform in establishing that in all acts leading up to, during and continuing to and including the end of the strike, the Appellants acted in concert and jointly." This obviously is an attempt to convert an action for breach of contract into an action for tort. Section 301 grants jurisdiction for breach of contract only.

Garmeada Coal Company v. United Mine Workers (District Court of Kentucky) 122 F.Supp. 512;

Square D. Co. v. United, etc. (District Court of Michigan) 123 F.Supp. 776;

Rock Drilling, etc., v. Mason (Court of Appeals, 2d Circuit) 217 F.(2d) 687.

Appellee's counsel suggest that unless this Court will expand the limited jurisdiction conferred by Section 301 of the Labor Management Relations Act of 1947, an "illogical" situation may result. This is a bald proposal that this jurisdictional statute be expanded to include tort actions as well as contract actions because it is said otherwise an employer in the position of the Appellee might be left without an adequate remedy.

That is not true but, even if it were true, it would not justify the District Court, nor this Court, in attempting to exercise a jurisdiction not granted by the Act of Congress. The fact is, however, that an employer in the position of the Appellee would not be left without a remedy in the hypothetical case suggested. If these two Unions, without justification, had combined, conspired or confederated together to obstruct the execution of the Appellee's contract with the Atomic Energy Commission, by so doing they would have committed a common law tort. For that tort the Appellee would have an adequate remedy by suing in any court of competent jurisdiction. It could sue in the District Court under 28 U.S.C.A., Section 1332, if it could satisfy the requirements of that section respecting diversity of citizenship. If it could not satisfy the requirements of that section, then the courts of Washington were open to it. It was so held in *United Construction Workers v. Laburnum Construction Co.*, 347 U.S. 656, 98 L.ed. 1025, a case substantially identical with the hypothetical case posed by Appellee's counsel. The same ruling was later made in *International Union etc. v. Russell*, 356 U.S. 634, 2 L.ed.(2d) 1030, decided May 26, 1956. An adequate remedy to recover damages resulting from a conspiracy to unlawfully obstruct the performance of Appellee's contract was available in the courts of Washington, especially because in Washington unincorporated labor unions can be sued as entities.

The Appellee cannot meet this objection by conjuring up a hypothetical case, nor can it demand that this Court amend and expand a jurisdictional statute. It

neither segregated the damages as between the two defendants nor did it prove that a segregation could not be made.

REPLY RE SPECIFICATION OF ERROR III-C

This Specification reads:

“(c) If Morrison-Knudsen Company, appellee, is a party to the two labor contracts which it now claims became applicable to its work in the Hanford area, nevertheless, it wholly failed to comply with the provisions of those contracts by making written demand for arbitration when the dispute arose respecting its commitment to continue to pay isolation pay and to furnish bus transportation.” (Opening Brief, page 16)

The Appellee brought this action for damages, claiming that the two labor contracts (Exhibits 2 and 3) effective January 1, 1956, were applicable to the Hanford area and that the Unions breached them when on March 22, 1956, the employer refused to longer furnish bus transportation which it had been furnishing since the work started on November 28, 1955. The alleged breach, according to Appellee, was a failure of the Unions to observe the provisions of the contracts relative to “Settlement of Disputes and Grievances.” The Appellants by their answers denied that the contracts were applicable to the Hanford area and denied that there was any breach of either of them. After a long period of negotiation during which the Appellee was demanding an amendment of the contracts to make them applicable to the Hanford area, the parties reached a stalemate on March 16, 1956, when the Unions declined to accept the contractors’ proposed amend-

ment. There is not the slightest suggestion of proof that when that stalemate occurred at that time the Appellee *in writing* and *within ten days* demanded arbitration as required by Article X of the Engineers contract (Exhibit 3) and Article IX of the Teamsters contract (Exhibit 2). Yet the Appellee is claiming damages for the alleged failure of the Unions to comply with the provisions of the contracts that the Appellee itself ignored and the very purpose of which was to prevent litigation. The only answer the Appellee's counsel make in their brief to our argument on this issue is:

“There was no pleading presented to the Trial Court tendering the issue, or was there proposed by Appellants any Finding of Fact or Conclusion of Law in support of such contention. The matter stands therefore in the category of a defense raised for the first time in the Appellate Court.” (Appellee's Brief, page 44)

It is difficult to imagine a more flagrant mis-statement of the record. So far as pleadings are concerned, the issue was raised by the Appellee's allegation that these provisions of the contracts were breached by the Unions and the Unions' denial of that allegation of the complaint. The statement that no proposed Finding of Fact was submitted to the Trial Court in support of this contention can only be accounted for upon the assumption that Appellee's counsel has not taken the trouble to read the record.

Although Rule 52(a), Rules of Civil Procedure, provides that: “Requests for findings are not necessary for purposes of review . . .”, the fact is that the Appellants

did make requests which appear in the printed record, Volume 1, pages 149-168. Requested Finding XX states:

“... The contract dated December 19, 1955, between Associated General Contractors and Teamsters Local 839 contained a provision reading:

“ ‘Article IX—Settlement of Disputes and Grievances

“ ‘Section 1. If a dispute involving the application or interpretation of the Agreement shall arise (other than jurisdictional disputes) written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either Contractors or the affected Union) to the other. If the two (2) parties are unable to adjust the same within forty-eight (48) hours, the dispute shall be settled by the following procedure * * * ’ (Plaintiff’s Exhibit 2, page 11)

“The contract dated December 24, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and Operating Engineers Local No. 370 contained an identical provision relative to procedures for the settlement of disputes and grievances. (Plaintiff’s Exhibit 3, page 9)

“There is no evidence from which the court can find that when the dispute arose between the plaintiff and the defendant Unions the plaintiff, by written notice or otherwise, invoked the settlement procedures provided in both of said contracts.”
(Tr. 161-162)

This and other findings requested were refused by the Trial Court because to make any of them would require that the Appellee’s action be dismissed. The

Court so stated in its order entered on April 21, 1958 (Tr. 169).

The trial of the liability issue commenced on June 10, 1957 (Tr. 179), and after going over a week-end was not concluded until June 19, 1957 (Tr. 779). Nevertheless, the Appellee's counsel now claim that the trial judge did not know by pleadings or otherwise what issues were being tried.

We agree with Appellee's counsel that the less said the better concerning the activities of Professor McCaffree, who ceased to be Executive Secretary of the Hanford Contractors Negotiating Committee in October, 1954, but who nevertheless, until March 8, 1956 (Exhibit 10), continued to write letters on the letter-head of that Committee and signed those letters as its Executive Secretary.

In their Brief, page 3, Appellee's counsel intimate that on the oral argument they may supply some further background necessary to a full and complete understanding of the issues presented. We suggest that when that time comes, without equivocation or evasion, they answer these questions relating to liability:

(1) Do you claim that there cannot be a Federal enclave within the meaning of Article I, Section 8, of the Federal Constitution, unless the Federal jurisdiction is so completely exclusive that the state within whose boundaries the enclave is situated cannot reserve any jurisdiction for any purpose, or is it sufficient that the state reserves only such jurisdiction "as is not inconsistent with the jurisdiction ceded to the United States" as the Washington statute of 1939 provides?

(2) What significance, if any, do you accord to the President's Executive Order No. 9816 of December 31, 1946, vesting *full jurisdiction* in the Atomic Energy Commission and the confirmation of that Executive Order by Section 241 of the revised Atomic Energy Act of 1954?

(3) If, as you state on page 3 of your Brief, there is not a word of evidence in the record to establish that when the contracts were being negotiated the parties did not intend to exclude the Hanford area, how do you justify the exclusion of the evidence offered by the Appellants and on your objection rejected by the Court?

(4) If the two labor contracts as executed on December 19, 1955, and December 24, 1955, and effective January 1, 1956, as written, were intended to include the Hanford area, why was the Contractors Committee headed by your witness, Mr. Sam C. Guess, its Executive Secretary, up to and including March 16, 1956, bending every effort to obtain an amendment to make those contracts applicable to the Hanford area?

(5) Do you claim that Section 301 of the Labor Management Relations Act of 1947 confers on the United States District Court jurisdiction in tort actions as well as jurisdiction in suits for violation of contracts?

(6) If the jurisdictional statute which is the basis of your action does not confer jurisdiction in tort actions, what is the basis of your claim that the Appellee is entitled to a joint and several judgment?

**REPLY ARGUMENT RE DAMAGES
SPECIFICATION OF ERROR V**

Responding to Appellee's argument on damages re "General Administrative Expense," it is to be noted that Appellee urges acceptance of a formula based upon "average daily scheduled revenue" and argues the soundness of its estimates supporting the claim and allowance made for "Efficiency Loss for Labor and Extra Cost Materials" (Appellee's Brief, pp. 60, 62, 63). Appellee's criticism of Appellants' argument claims, that because all progress of Appellee, and therefore all revenue was stopped by the work stoppage, the position of Appellant in denying administrative expense falls of its own weight.

It should first be pointed out that Appellants' argument is directed to the foundation of erroneous estimates and projections used by Appellee up to the date of work stoppage when it was \$227,000 behind its projected revenue schedule. To claim, as Appellee does that approval of Appellants' objections to the court's allowance for administrative expense, would be to permit Appellants to profit from their own wrong, injects a proposition which has nothing to do with the basis of Appellants' argument. We confine the factual basis of the issue, to the erroneous projections and estimates of the Appellee as they existed at the time of the work stoppage and not beyond. If the projection of Appellee were so far wrong at the time of the work stoppage, by what method of reasoning does Appellee suggest its projection thereafter should assume a new-found validity?

A close examination of the transcript of record leads us to believe that the Appellee's position is considerably more unsound in its claim for damages based upon its estimates than it has heretofore been. Mr. Alfred J. Goade, the Assistant Comptroller in charge of accounting administration for the Appellee, was recalled for further testimony on February 27, 1958, after Appellants had rested (Tr. 1223). During his examination, the following questions and answers appear in the record:

“Q. Well, you said that in Plaintiff's Exhibit 56 that as far as the mechanics of the computation, that it is correct mathematically, but you say the fact that they considered excess concrete is of no consequence. Now, I want to know if you say that is of no consequence, what effect, if any, does it have upon the accuracy of Plaintiff's Exhibit 33, the per yard determination there made?

A. Well, I don't believe that the computation that they made is sound, basically sound accounting-wise.

Q. And why is that?

A. Well, because they have used figures that were based, in the first place, on an engineers' estimate and not on actual cost.”

Substantially the whole claim of Appellee for its claimed efficiency loss for labor and extra materials, and its claim for general administrative expense, is bottomed on its engineer estimates and projections of scheduled revenue.

Although Appellee has argued that the excess labor costs arose because of the necessity of training crews,

etc., and that the excess material costs arose, in part, out of the costs of new forms, it is plain to see that if such additional costs were incurred they were minor and not in the substantial amount claimed in Appellee's total computation of excess costs. Plainly, the formula used by the Appellee gave no consideration whatsoever to the fact that the additional costs arose principally from the excess material and labor required over and above the very engineering estimates upon which Appellee took the job. Appellee claims its estimates are a reasonable and fair method of computation when Appellee uses them, but denounces as unsound a sounder method of computation used by the Appellant. And though Appellee can find its computation based upon "average daily scheduled revenue" to be sound when used by it (Appellee's Brief, p. 60), it is highly critical of a formula which insists that computation shall be made from the average daily *receipt of revenue* rather than the average daily scheduled revenue. We shall leave this argument where we find it.

We note in Appellee's brief that it neither answers nor considers Appellants' charge that because recovery of loss of profits and expenditures involves a double recovery, it cannot stand. There is no reference in Appellee's Brief to the argument of Appellants based upon the rule of law set out in Appellants' Brief (See Appellants' Brief, pp. 63, 64).

Appellee should not recover rental values for its machinery based upon A.G.C. and A.E.D. rental rates. The operation of Appellee's business and the facts and circumstances surrounding the charges made by Ap-

pellee to the Hanford job clearly distinguish the situation from Appellee's cited case of *Brand Inv. Co. v. United States*, 58 F.Supp. 749, cert. denied 324 U.S. 580. Appellee's central pool of machinery was operated as an adjunct of Appellee's business. The rental value of any machinery, other than charges made to the job, which was maintained or kept at the Hanford project would be wholly conjectural and speculative. Until the action of Appellee was commenced the items of rental charged in the accounting procedures of Appellee were the actual charges made by Appellee to its project, which had been used by Appellee in bidding the job at a figure which included profit. The Court's allowance of additional rental and profit should not be sustained.

Respectfully submitted,

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United States Court of Appeals
For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
LOCAL No. 839, and INTERNATIONAL UNION OF
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Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellee.

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EN BANC

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United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, LOCAL NO.
839, and INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL NO. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a
Corporation, *Appellee.*

No. 16102

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLANTS' PETITION FOR REHEARING EN BANC

TO THE HONORABLE CIRCUIT JUDGES STEPHENS, BARNES
AND HAMLIN:

As provided by Rule 23 of the court, the appellants
file this their petition for rehearing *en banc*.

At the outset, we assure your Honors that nothing
we may say critical of the decision filed on July 27,
1959 is intended to be or should be understood as dis-
respectful to the court or to the judge who wrote that
opinion.

By this petition we expect to convince your Honors:

1. That the court has misunderstood or misconstrued
the pleadings.

2. That the court has incorrectly construed many facts to which the opinion makes reference.
3. That the court has wholly failed to notice many undisputed vital facts which, if stated, would compel a reversal rather than an affirmance of the judgment.
4. That the court has erroneously decided not one but several important questions of Federal law arising out of the constitution itself as well as out of several acts of Congress. Some of these Federal statutes the court has mentioned but misconstrued and misapplied. Others the court has not noticed at all although applicable to the admitted facts and called to the court's attention in the briefs.
5. That as to the question involving the jurisdiction of the District Court to render a joint and several judgment, the decision is in direct conflict with the express language of Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C.A. § 185). It is also in direct conflict with Rule 20-a of Federal Rules of Civil Procedure. Moreover, the decision of this court is in direct conflict with the decision of the Court of Appeals of the Second Circuit construing Section 301 and with the decision of the Court of Appeals of the District of Columbia construing Rule 20-a pursuant to which the plaintiff (appellee) was authorized to join the two local unions in a single action. These decisions were called to the attention of the court in the appellants' briefs but as to them the opinion is completely silent.

Because of some of the discussion in the opening paragraphs of the opinion, it is necessary that we refer to the pleadings to some extent. The action was started

by a complaint filed on May 8, 1956 (Tr. 3-12), while the strike or lockout, whichever it was, was still in progress. The case was tried on the issues made by an amended complaint filed later, on November 9, 1956, and the separate answers of defendants (appellants) filed on December 13, 1956 and December 19, 1956 (Tr. 21-31).

The original complaint, though superseded by the amended complaint, was included in the printed transcript of record for one reason only. It described the two contracts between Associated General Contractors and the two local unions. Copies of those two contracts, together with a copy of a certain letter dated April 27, 1956 written by plaintiff's (appellee's) counsel to the two local unions, were attached to that original complaint as Exhibits A, B and C, and on the trial became Exhibits 2, 3 and 50. The amended complaint merely identified these exhibits by reference to the original complaint. For that reason, and that reason only, the original complaint was included in the printed transcript of record (Tr. 3-12).

Two separate and distinct labor contracts were described in the original complaint and by reference made a part of the amended complaint.

One was a contract between Associated General Contractors and Teamsters Local 839, dated December 19, 1955 (Ex. 2). The Engineers Local 370 is not a party to that contract. The other was a contract between Associated General Contractors and Engineers Local 370, dated December 24, 1955 (Ex. 3). Teamsters Local 839 is not a party to that contract.

In addition to the two local unions that executed those contracts, the plaintiff (appellee) also, in both complaints, joined as defendants Western Conference of Teamsters and Joint Council of Teamsters No. 28. Western Conference of Teamsters is a distinct organization which, as its name implies, carries on certain activities in the thirteen western states, namely, Washington, Oregon, California, Idaho, Nevada, Arizona, Utah, Montana, New Mexico, Wyoming, Colorado, Alaska and Hawaii, and also in three western provinces of Canada.

Joint Council of Teamsters No. 28 is another distinct labor organization whose activities are limited to the State of Washington. Neither Western Conference of Teamsters nor Joint Council of Teamsters No. 28 was a party to either of the contracts (Ex. 2 and 3) executed by the local unions. Nevertheless, the plaintiff (appellee) attempted to hold both of them liable for the alleged breaches of the contracts executed by the two local unions only.

In paragraph II of its amended complaint, the plaintiff (appellee) identified the four labor organizations joined the defendants (Tr. 13-14). By paragraph III of that complaint (Tr. 14-15), the plaintiff (appellee) specifically invoked jurisdiction under Section 301 of the Labor Management Act of 1947 (29 U.S.C.A. § 185) which grants a special and limited jurisdiction to United States District Courts over

“Suits for violation of contracts between an employer and a labor organization representing employees . . . without respect to the amount in con-

troversy or without regard to the citizenship of the parties.”

Obviously counsel for the plaintiff (appellee) in drafting both complaints was well aware of that restricted jurisdiction. But, in an effort to ostensibly state a cause of action against those two defendants not parties to either contract, the complaints had to make some allegations which plaintiff's (appellee's) counsel thought might possibly be sufficient to state a claim against them. To that end, the amended complaint alleged that *all four* of the defendant labor unions (two that executed the contracts and two that did not) acted in concert to bring about the work stoppage.

Paragraph VI of the amended complaint (Tr. 17-20) alleged that the two local unions acted jointly and then charged that they so acted “after first receiving the sanction, approval and consent of Joint Council No. 28 and Western Conference,”. The same paragraph then alleged that the strike or lockout, whichever it was, continued until June 6, 1956, “at which time the defendants (obviously meaning all four defendants) previously identified and described) agreed to resume work.” Further on in the same paragraph it is stated “that the plaintiff herein claims a right to recover from the defendants, as part of the damage sustained by it and as hereinafter mentioned, all sums paid to the membership of the defendants for isolation pay, etc.” In the following paragraph VII of the amended complaint (Tr. 20) the effort to state a cause of action against Western Conference of Teamsters and Joint Council of Teamsters No. 28 is again indicated by the

allegation of “inducing such breach by defendants as heretofore alleged” (Tr. 20). That allegation relative to “inducing” obviously is directed at the two defendants not parties to the contracts.

It is entirely clear that the allegations of the amended complaint quoted on page 2 of the opinion concerning concert of action were directed to the two defendant labor organizations not parties to the contracts. These allegations would be appropriate and necessary if the plaintiff (appellee) was suing for damages caused by an unlawful conspiracy or combination between all four defendants to unjustifiably obstruct the prosecution of this work, contract or no contract. They have no relevancy if, as appellants claim and the court’s opinion inferentially concedes, Section 301 of the Labor Management Act of 1947 confers no jurisdiction whatever on the District Court to deal with anything other than “suits for violation of contracts” as that section states in words too plain to be misunderstood.

The trial of the liability issue commenced on June 10, 1957 (Tr. 179). Immediately counsel representing the three Teamster unions moved to dismiss the action as to Joint Council of Teamsters No. 28 and Western Conference of Teamsters for the reason that the amended complaint wholly failed to state any cause of action against either of them within the jurisdiction defined by Section 301 of the Labor Management Act of 1947 (Tr. 181-182). The court took that motion under advisement and proceeded with other matters. Upon the convening of court on the following day that motion to dismiss was granted. At that time, and before

the motion was granted, counsel for the plaintiff (appellee) stated:

“It is my conception, if your Honor please, that the determination of whether that motion is good or whether it is bad must be determined by the pleadings, since it is made upon the pleadings and based upon the fact that we in our complaint have alleged that we have prosecuted this action and do prosecute it under Section 301 of the Taft-Hartley Act.

“I do not wish to concede the motion. As far as these defendants are concerned, I am frank to state to your Honor, however, that I do not believe that under the allegations of the complaint we have alleged a specific contract with the Joint Council or with the Western Conference. We have only alleged as to those two defendants that they acted in concert with the Teamsters Local and, in effect, authorized, after requested to do so, and participated in the strike itself, and I conceive that that type of action is, as Mr. Carey pointed out, possibly one in tort and not in contract, as inducing a breach or participating in a breach of contract.

“Therefore, without conceding the motion, I submit the matter to the Court under the Section 301. It is a new act, it is one that has not been too greatly construed by the courts, and I don't find any case in which this precise point—well, yes, there is one case in which this precise point was raised—and in that case the court held that, since there was no contractual relationship shown, the parent organization, so to speak, could not be held liable.” (Tr. 263-264)

The motion was then granted, the trial judge stating:

“I can’t conceive of how a party could be sued or would be liable for breach of contract without being a party to the contract.” Tr. 265)

See also “Stipulation Re Dismissal of Joint Teamsters No. 28 and Western Conference of Teamsters” dated June 19, 1957 (Tr. 121-122). Accordingly, the two defendants not parties to the contracts were dismissed when the formal judgment was entered on April 14, 1958 (Tr. 144-148) and no appeal from that dismissal has been taken.

It will thus be seen that appellee’s counsel, specifically admitted that the allegations of the amended complaint with reference to concert of action were inserted for the sole purpose of attempting to hold Joint Council of Teamsters No. 28 and Western Conference of Teamsters liable along with the two local unions that executed the contracts.

The emphasis which the court’s opinion places on the allegations concerning concert of action on the part of the original four defendants ceased to have any significance whatever after Western Conference of Teamsters and Joint Council of Teamsters No. 28 were dismissed.

As already stated, the case was tried on the issues made by the amended complaint and the separate answers of the defendants (appellants) in which, after admissions and denials, they affirmatively alleged that the labor contracts in question did not apply and were not intended to apply to the construction work per-

formed by the plaintiff (appellee) for the Atomic Energy Commission. The substance of this affirmative defense is correctly stated in the court's opinion, page 3. At no time after the filing of those answers and prior to the commencement of the trial on June 10, 1957, was any challenge interposed to the sufficiency of the affirmative defense so stated. At page 7 of the opinion, in a footnote, the court quotes an excerpt from a colloquy between the trial judge and counsel for the parties. At that time the trial judge inquired of defendants' counsel if they were intending to rely upon their affirmative defense as stated, and they answered in the affirmative. What relevancy that exchange between court and counsel has to the issues as later presented to this court on appeal is not stated in the opinion. The inference is that the author of the opinion finds something adverse to the appellants. That inference is not justified, for when that excerpt is read in context it is capable of no such construction.

As already stated, when the case was called for trial on June 10, 1957, for the sole purpose of trying out the liability issue, counsel for the Teamsters interposed a challenge to jurisdiction on behalf of Joint Council of Teamsters No. 28 and Western Conference of Teamsters. Counsel for the plaintiff (appellee) then made an oral motion to strike the affirmative defense stated in the answers of the Teamsters and Operating Engineers to the amended complaint. An extended discussion then took place between the trial judge and counsel for all parties (Tr. 182-192). That discussion is somewhat confusing to one not intimately familiar with

the record because counsel for the plaintiff (appellee) did not separately argue the motion to dismiss Joint Council of Teamsters No. 28 and Western Conference of Teamsters and his own motion to strike the affirmative defense stated in the answers. However that may be, during that discussion he not only admitted but emphasized that

“the suit is based upon contract, upon two contracts (describing them) . . . and the suit, as I say, is upon that contract.” (Tr. 183-184)

After that statement the excerpt quoted in the footnote then appeared (Tr. 184). Counsel for the plaintiff (appellee) then continued his argument, during which he stated, as was the fact, that somewhat similar language appeared in an answer to the original complaint but the pleadings then before the court had been changed to some extent (Tr. 185). It further appears from statements then made by both counsel and by the trial judge that when a motion against the affirmative defense as stated in the original answer was argued it was *not granted* because at that time the trial judge was of the view that:

“I think, of course, where there is a contract before the Court, particularly one which involves engineering or technical subjects and technical language, that it is advantageous for the Court perhaps to, in understanding background, understanding the subjects to which it is to apply, to understand the terms perhaps in some instances, that the Court may hear evidence of the negotiations leading up to the contract, the making of the contract in order to put the Court, as the Supreme Court of

the State of Washington said, in the same position of the parties, . . .” (Tr. 188)

Thus, at the commencement of the liability hearing, defendants’ counsel were confronted again with a challenge to the sufficiency of their affirmative defense which previously had been overruled. There was no reason why they should have anticipated at the beginning of the trial that they would be confronted with a contrary ruling. We, of course, do not wish to be understood as suggesting that a trial judge or, indeed, an appellate judge has no right to change his mind. On the contrary, the purpose of this petition is to convince your Honors that upon a more careful analysis of this record you ought to change your minds. The only significance of the excerpt quoted in the footnote on page 7 of the opinion is that the defendants’ counsel did not abandon their affirmative defense then or later. The fact is that as the trial proceeded the defendants made a trial amendment supplemental of the defense as originally stated, which was allowed by the trial judge (Tr. 446-447, Opening Brief pp. 10-11). Of that amendment this court takes no notice whatever.

Before noticing the several assignments of error argued in the briefs and discussed in the court’s opinion, we trust it will not be considered inappropriate or disrespectful to remind the court of a few elementary legal principles of contract law. When “A” sues “B” for breach of contract, to prevail “A” (in the absence of admissions by “B”) must prove all of the elements of a complete case, namely:

- (1) The execution or consummation of an agree-

ment between “A” and “B” applicable to the particular subject matter,

- (2) that “B” by some material act or omission violated the agreement,
- (3) that “A” has been damaged in some amount, and
- (4) the amount of that damage computed according to established principles of contract law.

It is not sufficient that “A” prove, one, or two, or three of these elements. His case must fail if proof of any one of these four essentials is lacking. To surmount a difficulty foreseen or unforeseen “A” is not privileged to substitute some amalgam of substantive contract law and substantive tort law blended in such proportions as may be thought necessary or convenient in that particular case.

These indisputable principles of the law of contracts should be kept in mind throughout a consideration of the case, and especially so in connection with the specification of error relating to the erroneous joint and several judgment.

APPELLANTS’ SPECIFICATION OF ERROR I RE STATUS OF THE HANFORD ATOMIC ENERGY PROJECT UNDER THE U. S. CONSTITUTION

In our opening brief, pages 20-26, we cited ten decisions of the Supreme Court of the United States in support of this assignment, two earlier decisions of this court, one decision from the Supreme Court of Washington, one decision from the Supreme Court of New Mexico and one decision from the Supreme Court

of Maryland. In its decision in this case this court (pages 5-6) attempts to dispose of all these authorities in one fell swoop by stating:

“The cases relied upon by appellant all deal with conflicts in the exercise of jurisdiction between the states and federal government. . . . These cases are not in point in determining the rights of the parties in the instant case. We are not here concerned with a conflict of jurisdiction between the state and federal government arising out of activities in the Hanford Area. We are here concerned with the question of what these parties intended when they contracted to do certain work in certain enumerated counties.”

Later, in discussing specification of error II, we will comment upon the final sentence of that quoted excerpt. That statement can only mean that Article I, Section 8, Clause 17 can never have application to any case unless that case involves a direct clash of jurisdiction between a state government and the federal government. The decisions so declared to be not in point are not capable of any such construction. Moreover, not a single decision cited by the appellee, or by the court, even remotely sustains the court's quoted statement as a review of the decisions cited in our opening brief will demonstrate.

Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 29 L.ed. 264, arose out of a dispute between a private corporation and a sheriff of Leavenworth County, Kansas, and concerned the liability of the railroad company to pay certain taxes levied under the claimed authority of the state. The Federal government

was not a party to the case and had not the slightest concern whether that railroad company was or was not liable for the payment of those taxes.

A companion case, decided on the same day as the *Fort Leavenworth* case (May 4, 1885), and not cited in our opening brief, is *Chicago, Rock Island and Pacific Railroad Company v. McGlinn*, 114 U.S. 542, 29 L.ed. 270. That was an action brought by the owner of a cow, alleged to be of a value of \$25.00, killed after it had strayed on to the railroad right of way within the limits of the Fort Leavenworth Military Reservation. Neither the State of Kansas nor the Federal government had the slightest interest in that cow.

Western Union Telegraph Company v. Chiles, 214 U.S. 274, 53 L.ed. 994, arose out of the claimed contractual liability of the telegraph company to deliver a telegram within the limits of the Norfolk Navy Yard. Neither the State of Virginia nor the Federal government had any interest whatever in the case.

Arlington Hotel Company v. Fant, 278 U.S. 439, 73 L.ed. 447, was an action by several individuals against the operator of a hotel located within the limits of the Hot Springs National Park to recover the value of certain personal property destroyed by fire. Neither the State of Arkansas nor the Federal government had the slightest interest in the destroyed property.

United States v. Unzeuta, 281 U.S. 138, 74 L.ed. 761, was a criminal case. The question was whether the District Court of the United States for the District of Nebraska did or did not have jurisdiction to try one in-

dicted for a murder committed on a railroad right of way within the limits of the Fort Robinson Military Reservation in Nebraska. The District Court sustained a plea to the jurisdiction, which was reversed. The State of Nebraska was not concerned whether the indicted party was or was not convicted in the Federal court.

An earlier case to the same effect (not cited in appellants' opening brief) is *Benson v. United States*, 146 U.S. 325, 36 L.ed. 991. This case is the same as the *Unzeuta* case, except that the murder occurred on a military reservation in Kansas instead of one in Nebraska.

Surplus Trading Company v. Cook, 281 U.S. 647, 74 L.ed. 1091, was an action between the Trading Company and a sheriff of Pulaski County, Arkansas, and concerned the liability of the Trading Company to pay taxes on certain personal property. The Federal government had no interest whatever in the question whether or not the Trading Company was liable for taxes in controversy.

Standard Oil Company of California v. California, 291 U.S. 242, 78 L.ed. 775, arose between a private corporation and the taxing authorities of California respecting its obligation to pay certain taxes on gasoline delivered within the limits of the San Francisco Presidio. The Supreme Court of California held the oil company liable. The Supreme Court of the United States gave that decision short shrift and promptly reversed it in a decision by Mr. Justice McReynolds. As appears from that opinion, when the case was in the

Supreme Court of California, counsel for the oil company contended that the San Francisco Presidio where the sale was consummated was no more within the jurisdiction of California than if that sale had been consummated in Nevada or Oregon. The California court rejected that contention, but that is exactly what the United States Supreme Court held in reversing the California court. So, in this present case, the Hanford Area is no more a part of Benton County than if, instead of being located in part within the exterior limits of Benton County, it were within the exterior limits of Nevada or Oregon.

The *San Francisco Presidio* case was decided on February 4, 1934. On that same day the United States Supreme Court decided *Murray v. Joe Gerrick & Company*, 291 U.S. 315, 78 L.ed. 821, affirming the Supreme Court of Washington in holding that the Puget Sound Navy Yard at Bremerton is not a part of Kitsap County, Washington. That was an action by the widow of a workman accidentally killed while working for an independent contractor within the limits of the navy yard. The action was against the employer for negligence. Neither the State of Washington nor the Federal government had any interest in the outcome of that litigation.

In *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285, 87 L.ed. 761, the Supreme Court of the United States again reversed the Supreme Court of California, as it had previously done in the *San Francisco Presidio* case, and held that Moffet Air Field in Santa Clara County, California, is not part of that

state. The litigation arose between a private corporation and the California Department of Agriculture. The Federal government was not a party to the case and had no direct interest in the outcome.

Johnson v. Yellow Cab Transit Company, 321 U.S. 383, 88 L.ed. 814, involved a controversy between a private corporation engaged in delivering intoxicating liquor to an officers' club, maintained at the Fort Sill Military Reservation in Oklahoma, and certain officers concerned with the enforcement of Oklahoma's liquor laws. The Federal government was not a party to the case and had no interest in it, unless it can be assumed that indirectly the Federal government might be concerned because of the possibility that some of its army officers might be deprived of a dependable supply of liquor.

Murphy v. Love, 249 F.(2d) 783. As stated on page 22 of our opening brief, the Court of Appeals of the Tenth Circuit made the same decision as to the Fort Leavenworth Military Reservation in Kansas as the United States Supreme Court had made as to Fort Sill in Oklahoma.

In our opening brief, page 25, we cited *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 82 L.ed. 1502. The Yosemite Park Company (appellee in the case), a private corporation, had a contract with the Secretary of Interior to operate hotels, camps and stores in the Yosemite National Park. Its contract entitled it to sell liquors, beer and wine to park visitors for prices approved by the Secretary of Interior. In

the ordinary course of its business it imported from places outside of California beer, wine and distilled spirits which it stored and sold within the park. Certain officers of the state, whose duty it was to enforce the provisions of the state "Alcoholic Beverage Control Act," threatened to interfere with the activities of that concessionaire. It brought a suit for an injunction in the United States District Court for the Northern District of California to enjoin the threatened interference. The case was heard before a panel consisting of one Circuit Judge and two District Judges who issued the injunction sought by the Park Company. A direct appeal was taken to the Supreme Court of the United States. In our opening brief, page 26, we quoted the syllabus of that decision as it appears in 82 L.ed., page 1502. We now quote the pertinent portions of that opinion as they appear in the opinion itself:

"The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, co-operatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. *These arrangements the courts will recognize and respect.*

"The State urges the constitutional inability of the National Government to accept exclusive jurisdiction of any land for purposes other than those specified in Clause 17, § 8, Article I of the Constitution. *This clause has not been strictly construed. This Court at this term has given full con-*

sideration to the constitutional power of the United States to acquire land under Clause 17 without taking exclusive jurisdiction. In that case, it was said: ‘Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation.’ (304 U.S., pages 528-529—emphasis supplied)

Again, the court said, at page 530:

“... the respective sovereignties should be in a position to adjust their jurisdictions. There is no constitutional objection to such an adjustment of rights. It follows that jurisdiction less than exclusive may be granted the United States.”

The District Court granted an injunction broadly prohibiting the state officers from interfering in any manner at all with the activities of the Park Company. But it appeared that the state in consenting to the acquisition by the Federal government had expressly retained the right to levy certain excise taxes. On appeal, the Supreme Court held that the injunction as issued by the District Court was too broad holding that, though the state had a right to collect the excise taxes, it had no right to enforce the other regulatory provisions of the Alcoholic Beverage Control Act. In concluding its opinion, the Supreme Court said:

“... As in our judgment, as heretofore pointed out, the tax provisions are enforceable and the

regulatory provisions unenforceable, it is necessary to reverse the decree and remand the cause to the District Court for a determination by the Court in accordance with this opinion of the applicability of such sections of the Act as the State may threaten to enforce.” (304 U.S. 539, 82 L.ed. 515)

The appellee in its brief, page 15, cites and quotes this decision under the obvious misapprehension that in some way it favors its contention that there can never be a Federal enclave within the meaning of Article I, Section 8, Clause 17, unless the Federal jurisdiction is completely exclusive. That is exactly what the decision does not hold. That decision cited by both the appellants and by the appellee favors one side or the other. If it does not support the contention of the appellee, then it does support the contention of the appellants. Yet the opinion of this court passes it by in complete silence.

In support of the statement at page 5 of the opinion that Article I, Section 8, Clause 17 of the U.S. Constitution can have no application except in cases dealing “with conflicts in the exercise of jurisdiction between the states and the Federal government,” the opinion cites the *San Francisco Presidio* case, 291 U.S. 242, 78 L.ed. 775, and the *Moffet Air Field* case, 318 U.S. 285, 87 L.ed. 761. The only ground upon which these cases can conceivably seem to support the court’s statement is that in some degree the imposition of excise taxes in the *Presidio* case and the regulations of the state in the *Moffet Field* case might indirectly and remotely tend to

increase the price of oil and dairly products required by agencies of the Federal government. The opinion does not so state, but that is the only possible inference. If that is what the court meant to infer, it is wholly inadmissible when the *Presidio* case, 291 U.S. 242, 78 L.ed. 775, is considered in the light of the *Bremerton Navy Yard* case, 291 U.S. 315, 78 L.ed. 821. Both the *Presidio* case and the *Bremerton Navy Yard* case were unanimous decisions of the United States Supreme Court as then constituted. Both were decided on the same day (February 5, ~~1951~~ 1934). The opinion in the *Presidio* case was written by Mr. Justice McReynolds, and Mr. Justice Roberts concurred. The opinion in the *Bremerton Navy Yard* case was written by Mr. Justice Roberts, and Mr. Justice McReynolds concurred. In addition to those two justices, the court as then constituted consisted of Chief Justice Hughes and Associate Justices Van Devanter, Brandeis, Sutherland, Butler, Stone and Cardozo. If one of those cases was distinguishable from the other for the reason implied in the decision of this court, it is inconceivable that none of the other seven members of the court could possibly have overlooked such an important distinction involving the construction of an important provision of the Federal Constitution.

Having reviewed the cited decisions of the Supreme Court of the United States, it is unnecessary, we think, to further analyze the two earlier decisions of this court cited in our opening brief at page 22, except to point out that in discussing *Yellowstone Park Transportation Company v. Gallatin County*, 31 F.(2d) 645, we

said that it had to do with the taxation of *lands* in Yellowstone Park. That statement is incorrect. It concerned the attempted taxation of certain *personal property* operated by the Yellowstone Park Transportation Company, a private corporation. Neither is it necessary to further notice at length the three decisions of state courts, one by the Supreme Court of Washington, one by the Supreme Court of New Mexico, and one by the Supreme Court of Maryland, cited in our opening brief at pages 22-25.

Suffice it to say that they are in complete harmony with the decisions of the Supreme Court of the United States and are wholly inconsistent with the opinion in this case.

When the cited decisions of the Supreme Court of the United States are analyzed it must be clear that they do not support the declaration that Article I, Section 8, Clause 17 of the United States Constitution applies only in cases dealing "with conflicts in the exercise of jurisdiction between the states and the Federal government." True, that clause may become involved in cases in that category, but it is also equally applicable in cases in which neither a state nor the Federal government has any interest at all. For instance, it was involved in the case concerning the killing of the cow on the Fort Leavenworth Reservation (114 U.S. 542, 29 L.ed. 270). It was involved in the case concerning the contractual liability of the telegraph company to deliver a message within the limits of the Norfolk Navy Yard (214 U.S. 274, 53 L.ed. 994). It was involved in

the case concerning the loss by fire of the personal property of the guest in a hotel located within the limits of the Hot Springs National Park (278 U.S. 439, 73 L.ed. 447). It was involved in the case concerning the action for damage by the widow whose husband was accidentally killed while working for an independent contractor within the limits of the Bremerton Navy Yard (291 U.S. 315, 78 L.ed. 821). The New Mexico case, *Arledge v. Mabry*, 52 N.M. 303, 197 P.(2d) 884, related to the Los Alamos Project in Sandoval County, and the right to vote in New Mexico. *Lowe v. Lowe*, 150 Md. 592, 133 Atl. 729, concerned the Maryland divorce statute. It cannot be supposed that the Federal government had the slightest interest whether the complaining husband or the cross-complaining wife did or did not secure a divorce.

After first arguing that the Hanford area could not exist as a federal enclave because the federal jurisdiction is not completely exclusive, the appellee relies upon an alternative founded upon the letter of November 8, 1943, from the Secretary of War to the Governor of the State of Washington included in Exhibit 20 and also printed in the Transcript at page 73. That is one of five letters constituting the exhibit. On May 26, 1943, after the United States by condemnation had first acquired lands in Benton County and adjoining counties for incorporation in the Hanford project, the Secretary of War wrote a letter to the Governor of Washington accepting jurisdiction. Later, the Secretary of War wrote the letter of November 8, 1943, stating that:

“The War Department does not desire to exercise concurrent jurisdiction over this reservation, but prefers that it remain under the jurisdiction of the State of Washington.”

The later letters in Exhibit 20 are to the same effect and presumably were written because in the meantime the additional lands had been acquired.

In the first place, having once accepted jurisdiction by the letter of May 26, 1943, it is at least doubtful if the Secretary of War had any authority from Congress to revoke that acceptance by the letter of November 8, 1943, but there is no need to stress that point because the only authority the Secretary of War had to write this letter of November 8, 1943, was that conferred by the act of Congress of October 9, 1940 (40 U.S.C.A., Section 255).

In the leading case of *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 29 L.ed. 264, decided in 1855, the court discussed generally the constitutional provision relative to the acquisitions of lands for military establishments, which are to be made “*by session of particular states, and acceptance by Congress.*” Until the passage of the act of October 9, 1940 (40 U.S.C.A., Section 255) there was no provision of law authorizing any administrative officer to accept or refuse acceptance of jurisdiction. Until then Congress itself had to act. Accordingly, the act of 1940 was passed defining the authority of heads of departments and independent establishments or agencies of the government. The letter of November 8, 1943, must be read in the light of

that statute, pertinent provisions of which are quoted in appellee's brief, pages 5-6, and read:

“Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; * * *

Here follows the provisions authorizing acceptance by heads of departments, etc. The act then continues:

“*Unless and until* the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.”

After quoting from the letter of November 8, 1943 (Opinion, page 4) and an excerpt from the President's Executive Order No. 9816 (Opinion, page 6), the opinion proceeds to dispose of the question by this novel statement:

“This did not result in there being transferred to the Atomic Energy Commission anything more than the United States had at that time. If the United States did not at the time of the passage of this Act have exclusive jurisdiction over the Hanford Works Area, and we hold that it did not, it could not transfer to the Atomic Energy Commission something which it did not have.”

The court speaks as if the transfer from the War Department to the Atomic Energy Commission on December 31, 1946, was a conveyance in the nature of a quitclaim deed from the War Department, one agency of the federal government, to the Atomic Energy Com-

mission, another federal agency. If John Doe by quitclaim deed conveys a described tract of land to Richard Roe, the grantee gets a perfect title if the grantor has a perfect title. The grantee gets a defective title if the grantor has a defective title. The grantee gets no title at all if the grantor has no title. That rule of real estate law has no possible application to the transfer of the Hanford area to the Atomic Energy Commission by the President's Executive Order of December 31, ~~1956~~. The ¹⁹ quoted statement from the opinion is equivalent to saying that when the Secretary of War wrote the letter of November 8, 1943, he irrevocably abrogated in perpetuity the constitutional powers of both Congress and the President as President and Commander-in-Chief of the Army and Navy from ever thereafter accepting jurisdiction, exclusive, concurrent or partial. The statute is capable of no such construction and, if it be so construed, a serious question of its constitutionality would emerge, because Congress is without power to abdicate its functions and make a wholesale delegation of its constitutional powers to any administrative officer, however exalted he may be. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L.ed. 893, Chief Justice Hughes, speaking for the United States Supreme Court, said:

“We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same.” (301 U.S. p. 30, 81 L.ed. p. 908)

The Supreme Court of the United States considered the act of October 9, 1940 (40 U.S.C.A., Section 255) in *Adams v. United States*, 319 U.S. 312, 87 L.ed. 1421. Three soldiers stationed in a military camp in Louisiana had committed a serious crime and were convicted in the United States District Court for the Western District of Louisiana. Formal acceptance of jurisdiction had not been made as prescribed by the act of October 9, 1940. On appeal from that conviction, the Department of Justice confessed error and the case was reversed for want of jurisdiction. In stating why the act of October 9, 1940, was passed, the court in a footnote quotes from the congressional history of the bill as follows:

“In the words of a sponsor of the bill, the object of the act was flexibility, so ‘that the Government *could at any time* designate what type of jurisdiction is necessary; * * *

The Secretary of War in writing the letter was but an agent of the federal government with the limited authority defined in the statute. We venture to think that it is a rather startling proposition of federal constitutional law to say that Congress after that letter was written by the Secretary of War could never thereafter exercise its constitutional powers, either directly or by direction to the President who, of course, is the superior of the Secretary of War, both as President and as Commander-in-Chief of the Army and Navy.

For reasons stated in our reply brief, pages 3-9, the passage of the Atomic Energy Act of 1946, together with the Executive Order No. 9816 promulgated on

December 31, 1946, by the President as directed by that Act, was a direct and unequivocal acceptance of jurisdiction by Congress itself. In the opinion, no notice is taken of the authorities cited on page 9 of our reply brief which clearly sustain that contention.

The statute by authority of which the letter of November 8, 1943, was written plainly says that such a letter does nothing more than create a *presumption of non-acceptance*, which presumption continues to exist only *until* the United States does accept. A presumption by its very nature is a temporary expedient. As the Supreme Court of Washington has well expressed it in *Beeman v. Puget Sound Traction L. & P. Co.*, 79 Wash. 137, at page 139:

“They (presumptions) are never allowed to displace facts.”

and, quoting from a cited case, it said:

“Presumptions as happily stated by a scholarly counselor *ore tenus*, in another case, may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.”

Before the quoted excerpt appearing on page 6 of the opinion irrevocably becomes a final pronouncement of this court, we respectfully suggest that it should receive the consideration of the court *en banc* and the concurrence of at least a majority of the active judges.

**Appellants' Specifications of Error II and VI
Concerning Meaning of Benton County as
Used in the Labor Contracts**

These specifications are discussed in our opening brief, pages 33-42, in appellee's brief, pages 17-29, and in our reply brief, pages 13-19. The question is, what did the parties mean by the term "Benton County" when the two labor contracts (Exhibits 2 and 3) were negotiated in November and December, 1955, nearly 13 years after the Federal government first acquired lands in Benton and surrounding counties for national defense uses and 9 years after Congress and the President, by direct action, transferred the Hanford area from the War Department to the newly-created Atomic Energy Commission, conferring on that new agency full jurisdiction consistent with the constitution and laws of the state of Washington. The appellee maintains that the term "Benton County," as so used, of necessity means that county as it existed territorially prior to February, 1943. The appellants insist that the term "Benton County" means that county as it existed when the contracts were being negotiated in November and December, 1955. By its opinion, the court has sustained the appellee's view. The appellee in its brief, as said in our reply brief, at page 2, has largely confused these Specifications II and VI with its discussion of Specification I. To an extent, the court has done likewise. If, as the appellee has contended and the court has held, the term "Benton County" as a matter of law must be read as meaning that county as it existed at the earlier date and cannot by any possibility mean

that county as it existed at the time the contracts were executed in 1955, then the discussion in the opinion concerning Specifications II and VI is wholly irrelevant. Yet, the court, doubtful of the validity of its decision as to Specification I, proceeds to rely upon extrinsic facts said to support the view that when negotiating the contracts in November and December, 1955, the parties intended "Benton County" to mean that county as it existed territorially at the earlier date. On page 6 of its opinion it is said that:

"We are here concerned with the question of what these parties intended when they contracted to do certain work in certain enumerated counties. One of the counties enumerated is Benton County."

A large part of appellee's brief directed to these two specifications is devoted to the citation and discussion of numerous decisions stating the elementary rule that extrinsic evidence will not be received to modify or explain the language of a written contract when the contract is unambiguous and not capable of more than one meaning. We, of course, do not dispute that rule, and so stated specifically on pages 12-13 of our reply brief. The question here is not the existence of the parol evidence rule, but rather its application to undisputed facts. The court, in its opinion, cites one Washington case (*Schwieger v. Robbins & Co.*, 48 Wn.(2d) 22) in which the Supreme Court of Washington stated (quoting from the syllabus) that:

"The court will not interpret the meaning of unambiguous contracts. . . . The court will not permit

oral evidence to establish or create an ambiguity in a written contract.”

That is but a concise statement of hornbook law that we would not be so brash as to question. The question here is, does the term “Benton County” mean that county as it existed when the contracts were negotiated or does it mean that county as it existed territorially some thirteen years earlier. The court, in its opinion, makes no mention at all of any of the authorities we cited in support of our view (see opening brief, page 35, and Appendix III opening brief, pages 97-99). To bolster its decision, in overruling our Specification of Error I, the court itself resorts to extrinsic facts when, in the paragraph of the opinion at pages 6-7, it says:

“There was also testimony before the trial court that all the criminal laws of the state of Washington were enforced within the Hanford Works Area by the sheriffs of the various counties, that within the Area there is a Justice of the Peace who has an office and holds court within the Area under the appointment of the county supervisors. The schools within the Area are under the Washington State Department of Education the same as other school districts within the state and receive their per capita from the state. A witness connected with the Atomic Energy Commission testified that he was a resident of the Hanford Works Area and that he voted in state elections as a resident of the State of Washington.”

First, as to the enforcement of certain Washington criminal laws by the sheriffs of the various counties: As shown in our reply brief, page 10, an act of Congress

known as the Assimilated Crimes Act of 1948 (18 U.S. C.A., Section 13) specifically provides for the enforcement of certain criminal laws of the state within the limits of a Federal enclave. Moreover, the appellee's witness (Mr. Bacon) who testified on that subject said that, while the law enforcement officers were deputized by the county sheriff (Tr. 762), the guards and police within the barrier, as well as the fire department, were paid by the Atomic Energy Commission (Tr. 777-778). These facts but emphasize that the Hanford Area has been operated and treated as a Federal enclave.

Second, it is said that schools within the area are under the Washington State Department of Education, the same as other schools within the state, etc. That statement is in direct conflict with the evidence introduced by the appellee itself, namely, Exhibits 17 and 18, referred to in our opening brief, pages 31-32. Those exhibits are contracts between Atomic Energy Commission and Richland School District 400, which were entered into under authority of the Atomic Energy Act itself (42 U.S.C.A., Section 2208), because and only because the Hanford Area is a Federal enclave of which that Commission has full jurisdiction consistent with the constitution and laws of the state of Washington.

Third, it is said that a witness connected with the Atomic Energy Commission (Mr. Bacon) testified that he was a resident of the Hanford Works Area and that he voted in state elections as a resident of the state of Washington. The evidence of Mr. Bacon on that subject elicited by appellee's counsel reads:

“Q. (By MR. DEGARMO): Mr. Bacon, as a resident of Richland, Washington, do you vote?

A. Yes, sir.

Q. Has there been a time since when you took up residence at Richland when you have not been permitted to vote as a citizen of the State of Washington, to your knowledge?

A. No, sir; I don't believe I even had to wait. I had been a resident of the state before my moving there, so I had legal residence in the state.” (Tr. 768)

Mr. Bacon, a qualified voter of the state of Washington, did not lose his voting rights when he became employed by the Atomic Energy Commission, for the same reason that a United States Senator from California does not lose his voting rights when he takes up his residence in Washington, D. C.

There are some other facts in the same category not mentioned in the court's opinion. A plan for compensating injured workmen and their dependants was inaugurated, but as a matter of convenience it was administered by the State Labor Department under a contract with the Atomic Energy Commission. This contract was introduced by the appellee (see opening brief, page 31). That again proves, if it proves anything, that the Hanford Area was regarded by both state authorities and Federal authorities as a characteristic Federal enclave.

In discussing this specification, the court on page 9 quotes a sentence out of context taken from a paragraph appearing on page 36 of the opening brief. One

unfamiliar with the record and unfamiliar with the briefs would be justified in concluding that we had waived the erroneous ruling of the trial court in striking our affirmative defense to the amended complaint. As quoted, that sentence reads:

“most of the evidence which would have been admissible if the affirmative defenses had not been stricken, later came into the record * * * ”

The paragraph of our brief from which the quoted sentence is taken reads:

“ * * * the striking of defendants’ affirmative defenses has now ceased to be of any great materiality.

“In the first place, the appellee to prevail had the burden of proving that the two contracts effective January 1, 1956, were applicable to the Hanford area. It was not relieved of that burden because the appellants affirmatively said that they were not applicable.

“In the second place, as the trial court indicated at a later stage of the trial (Tr. 377-378), in view of the oral and documentary evidence, the court was no longer concerned with any technical questions of pleading, but rather with the effect to be given to the undisputed evidence.

“In the third place, most of the evidence which would have been admissible, if the affirmative defenses had not been stricken, later came into the record under the trial amendment set forth at page 10.

“In the fourth place, both the oral and documentary evidence introduced by the appellee itself proves conclusively that the two contracts

in question were not applicable to the Hanford area.”

When, in that quoted paragraph, we said “most of the evidence” we meant exactly what we said. If we had meant all of the evidence we would have said *all* and not *most*.

If, as stated in the opinion, “we are here concerned with the question of what the parties intended when they contracted to do certain work in certain enumerated counties,” nothing could be more important than the offered evidence of the appellants’ witness Rossman, by whom the appellants sought to prove that on November 3, 1955, the Chairman of the Contractors’ Negotiating Committee stated specifically that they were not negotiating at all with the Hanford area in mind (see reply brief, pages 17-18).

In the affirmative defense pleaded in appellants’ answers to the amended complaint, those being the answers upon which the case was tried, and the only answers before this court, the appellants did not claim that the Federal jurisdiction of the Hanford Area was completely exclusive for the all-sufficient reason that it was entirely unnecessary to make any such claim. The statute heretofore discussed (40 U.S.C.A., Section 255) which, as we have said, was the sole authority for the Secretary of War, writing the letter of November 8, 1943, specifically recognizes that there may be a Federal enclave within the meaning of Article I, Section 8, Clause 17 of the Federal constitution without the Federal jurisdiction being exclusive. That juris-

diction may be exclusive, or partial, or in some respects concurrent, as that statute and the decision of the Supreme Court of the United States in the *Yosemite Park* case (*Collins v. Yosemite Park and Curry Co.*, 304 U.S. 518, 82 L.ed. 1508) states too plainly for any misunderstanding.

The discussion of these two Specifications of Error might be continued on and on, but it will have to be ended sometime so we will stop now, and proceed to the consideration of other specifications.

Appellants' Specification of Error III-A

This specification is discussed in our opening brief, pages 43-46, in appellee's brief, pages 29-35, and in the reply brief, pages 19-20. It raises the question whether the appellee can maintain a suit on the labor contracts (Exhibits 2 and 3), neither of which it had signed. We cited *Ketcher v. Sheet Metal Workers*, 115 F.Supp. 802, a decision of the United States District Court for the Eastern District of Arkansas. The appellee cited *Farina Bros. Co. v. United Brotherhood of Carpenters*, 152 F.Supp. 423, a decision of the United States District Court for the Massachusetts District, which is directly to the contrary. We concede the right of this court to prefer the *Farina* decision to the *Ketcher* decision, until the court of last resort has spoken on the precise point.

**Appellants' Specification of Error III-B Concerning
Appellee's Commitment at the Pre-Job Conference
of January 5, 1956, to Continue Existing
Working Conditions Under Hanford
Works Agreement**

This specification of error is discussed in our opening brief, pages 46-51, in appellee's brief, pages 35-43, and in the reply brief, pages 20-24. In Appendix IV to our opening brief we set out in detail the uncontradicted evidence of all the witnesses, including the express admission by the appellee's Director of Labor Relations that at that pre-job meeting he did make the unqualified commitment attributed to him by appellants' witnesses. Appellee's counsel among other things claimed (appellee's brief, page 43) "that no such defense was pleaded," in spite of the fact that the trial amendment allowed during the trial, and quoted at length in our opening brief, was sufficiently broad to justify the trial judge in admitting the evidence as the trial judge did. However that may be, Rule 15 of Rules of Civil Procedure specifically provides that the pleadings shall be deemed amended to conform to the evidence; that failure to amend does not affect the result of the trial; and that the court may grant a continuance to enable an objecting party to meet evidence not within the pleadings as strictly construed. Appellee made no request for continuance for the obvious reason that such a request would have been frivolous because the evidence came from the mouth of its own witness.

In its opinion at page 4, the court in dealing with this specification states:

“Under specification 3(b) appellants contend that the appellee precipitated the work stoppage. Suffice it to say that upon this point the trial court made a finding adverse to the appellants upon the basis of all of the evidence. We hold there is ample evidence to support this finding.”

The record does not support that statement. The trial court could not have made an adverse finding of fact on disputed evidence because there was no disputed evidence. The fact is the trial court made no finding of fact at all, and we say that advisedly. What was said in the findings of fact proposed by the appellee and adopted by the trial judge appears in the Transcript, Volume 1, page 136, where it is recited:

“ * * * that any statement or statements claimed by witnesses for the Defendants to have been made by Lee E. Knack, Manager of Labor Relations for Plaintiff, at a meeting held in Pasco, Washington, on January 5, 1956, were not made as a contractual commitment on behalf of Plaintiff * * * ”

That so-called finding to the extent that it is a finding of fact actually is an admission by the appellee and a finding by the trial judge that the commitment was made but the appellee would avoid its legal effect by stating that it was “not made as a contractual commitment.” Whether a certain set of undisputed facts does or does not amount to a “contractual commitment” is a conclusion of law even though incorporated in a document entitled “Findings of Fact.” The effort of the appellee to make it appear that the appellee’s admitted pre-job commitment was nothing more than some idle

chatter should not be accepted as valid. To convert an unsupported conclusion of law into a valid adverse finding of fact exactly matches the observation of Mr. Justice Frankfurter in *Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 85 L.ed. 836, p. 841, where he aptly observed that it is of prime importance that important rights should not be defeated "by insubstantial findings of fact screening reality."

On the oral argument appellee's counsel attempted to make it appear that the appellants admitted that the commitment to continue isolation pay and furnish bus transportation was not binding on the appellee because, as stated on page 47 of our brief, we said that we did not claim that Doctor McCaffree did have authority to speak for and bind the appellee. When quoting that sentence out of context, he failed to supplement it by what we did say at page 50, that:

"The appellants do not claim that the commitment became binding on appellee because originally made by Doctor McCaffree on Decmeber 29, 1955. It became binding upon the appellee because with full knowledge of it and the conditions resulting from it Mr. Knack, who did have authority, adopted it, ratified it and on January 5, 1956, made it his own."

Appellants' Specification of Error III-C Concerning the Appellee's Violation of the Provisions of the Contracts Prohibiting Strikes and Lockouts

This specification is discussed in the opening brief, pages 57-60, in the appellee's brief, pages 43-50, and in

our reply brief, pages 27-30. It relates to the sections of the contracts providing that there shall be no strikes or lockouts and providing that any disputes that may arise shall be settled by arbitration. These provisions are quoted in the opening brief, pages 57-58, and are equally binding both on the employer and the local union executing the contract. Each contract specifically provides that if a dispute arises, written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either employer or the union) to the other. It further provides that if the two parties are unable to adjust their differences within forty-eight (48) hours, the dispute shall be settled by arbitration and then provides in detail how the arbitrators are to be selected.

The evidence is undisputed that the work stoppage occurred on March 23, 1956, when the workmen reported for work and found no buses available to take them to their places of employment. The job was not picketed until April 5, 1956, two weeks later. There is no pretense that the appellee within that period of fourteen days, and much less within the maximum period of ten days stipulated in the contracts, gave any written notice of a demand for arbitration so that the unions could comply with the arbitration provisions of the contracts.

In disposing of this specification the court in its opinion at page 10 says:

“Appellant(s) made no pleadings in the trial court tendering this issue, nor did they propose

any findings of fact or conclusions of law in support thereof.”

That statement is but a repetition of the answer the appellee attempted to make to that specification and is completely answered in our reply brief, pages 27-30. The effect of the court's opinion is to say that there was no obligation at all on the appellee, after it had caused the work stoppage on March 23, 1956, to comply with the arbitration provisions of the contracts because conceivably if it had given the written notice within the limited time stipulated, its demand might not have produced results. That, we submit, is no answer at all. Further in this connection as pointed out in our opening brief, pages 59-60, what appellee was attempting to do, from March 16, 1956, until the work stoppage on March 23, 1956, according to evidence of its own witness, Mr. Sam C. Guess, was to prevail upon the unions to agree to mediate an amendment proposed by the contractors for the specific purpose of making the contracts applicable to the Hanford area.

If the two labor contracts as written and in effect since January 1, 1956, did apply to the Hanford area, then the appellee itself in the first instance indisputably failed to comply with the arbitration provisions which it now claims were violated by the appellants. It will not do for the court to say, as in effect it has said, that the unions were bound to comply literally with the arbitration provisions of the contracts but that the appellee at its election was privileged to ignore them.

Appellants' Specification of Error IV re Joint and Several Liability

This specification is discussed in our opening brief, pages 51-57, in the appellee's brief, pages 51-55, and in the reply brief, pages 24-27. The joint and several judgment with interest and costs now amounts to approximately \$160,000. We do not mean to suggest that, because the judgment is large, that alone is a controlling reason why a rehearing should be granted, but we think it is a factor entitled to some consideration. In considering this specification, it is especially important that the court bear in mind what has already been said on the preceding pages 11-12, that having elected to sue for breach of contract under Section 301 of the Labor Relations Act of 1947, the appellee had the burden throughout to prove all the indispensable elements of a contract cause of action. To surmount some difficulty, foreseen or unforeseen, it was not privileged to substitute some blend of substantive contract law and substantive tort law as might be found convenient.

The court attempts to dispose of this specification by the discussion appearing at pages 12-13 of the opinion. In stating some of the facts which it conceived as authorizing the joint and several judgment, the court at page 11 makes one serious mis-statement of the record, no doubt misled by a statement appearing in appellee's brief at page 52 where it is said:

“The establishment of pickets on April 5, 1956, was jointly by the Teamsters, Operating Engineers and Cement Finishers.” (Tr. 410)

The court accepts this as a correct statement by saying at page 12:

“ * * * and they (the two local unions) each participated in the work stoppage on March 23. Thereafter, each appellant union established pickets on April 5, 1956.”

The record supports neither the statement in appellee's brief nor that made by the court. The only witness who testified concerning picketing was Ramon E. Reed, the Project Manager. Mr. Reed testified (Tr. 409-410) that there were no pickets on the job on either March 22 or March 23, 1956. A picket first appeared on April 5, 1956, when Mr. Reed saw one picket at the bridge at the Richland entrance. That picket was leaning against a car. There was a sign saying that the Hanford contractors were unfair and it mentioned three unions, namely, Teamsters, Operating Engineers and Cement Finishers. That is the evidence and the only evidence relative to picketing. That one picket was not identified by Mr. Reed nor by anyone else as either a Teamsters' picket or an Operating Engineers' picket. He may have been a picket placed there by the Cement Finishers or, indeed, by any other of the dozen or more unions affiliated with the Pasco-Kennewick Building Trades Council whose members had been deprived of transportation by the elimination of buses two weeks earlier.

The statement that “each participated in the work stoppage on March 23, 1956,” is without any support in the record. The cessation of work from March 22 or March 23, whichever is the correct date, to April 5,

1956, when the job was picketed by somebody not identified, was caused solely by the refusal of the appellee to furnish the bus transportation that it had been furnishing since the job was started on November 28, 1955, and which its Director of Labor Relations had promised to continue.

When the case was heard in this court on May 13, 1959, the argument on behalf of both appellants was made by counsel who had represented Operating Engineers Union 370 at the trial. This procedure was adopted because in a case involving numerous questions of law and fact it is a waste of time for several counsel on the same side to divide forty-five minutes.

During appellants' opening argument, one member of the court (Judge Barnes) repeatedly asked the appellants' counsel, "How are you hurt?" The question as put by His Honor could only mean how have the appellant unions been hurt by the joint and several judgment, conceding it to be erroneous for jurisdictional or other reasons. That question for the first time implied a possible justification not remotely suggested in appellee's brief. The answer to that question is clear. If Section 301 of the Labor Management Relations Act of 1947 does not authorize a joint and several judgment, one union or the other or both will be seriously hurt. If John Doe secures a judgment for \$160,000 against Richard Roe who is worth \$160,000, and that judgment is erroneous for jurisdictional or other reasons, Richard Roe is going to be hurt to the extent of \$160,000, unless the erroneous judgment is vacated on appeal.

The appellee sued the Teamsters Union for breach of contract, claiming that it had caused some damage properly chargeable against its contract. Likewise, it sued Operating Engineers Union for breach of contract, claiming that it had caused some damage properly chargeable against its contract. One union or the other may have caused all the damage. One union may have caused some of the damage and the other union may have caused the balance. If the Teamsters Union caused but half of the damage, as may have been the case, then it is going to be hurt to the extent of the excess that it may have to pay over that one-half. The same thing is true of the Operating Engineers Union. Conceivably but one-third or one-tenth of the total damage may have been caused by one union and yet by this judgment it must pay the entire 100% if the appellee elects to pursue it alone. As pointed out in our opening brief, page 57, there is no evidence in the record by which the court can now assess total damage found as between Teamsters Local 839 and the Operating Engineers Local 370 according to their respective liabilities as Rule 20-A of Rules of Civil Procedure requires. As stated in our reply brief, pages 26-27, appellee neither segregated the damages as between the two defendants nor did it prove that a segregation could not be made. In the absence of evidence, this court cannot properly hold as a matter of law that a segregation cannot be made and for that reason the appellee is entitled to a joint and several judgment.

Appellee's counsel in their brief admit that they do not and cannot question the authorities we have cited

(opening brief, pages 53-54) holding that when two defendants are liable on several and distinct contracts, there can be no joint liability. The opinion of the court does not state why those authorities are not controlling. Hence, it is unnecessary to do more now than again refer to the law as stated by Professor Williston, probably the outstanding authority on the law of contracts:

“THE CIRCUMSTANCE THAT PROMISES ARE CONTAINED IN SEPARATE INSTRUMENTS THOUGH IN IDENTICAL TERMS SHOWS THE PROMISES TO BE SEVERAL.” Williston on Contracts, Vol. 2, Sec. 323, p. 940.

The judgment as entered originally on April 14, 1958 (Tr. 144-148) is admitted to be a joint and several judgment in substance and form. If the appellee is entitled to that kind of a judgment, it is still unexplained why the amendatory order of May 8, 1958, was entered (Tr. 171-174).

In the final paragraph of the opinion it is said that the *pro tanto* provisions of the amending order of May 8, 1958, were inserted for the benefit of the appellants. What benefit does that phraseology confer? If that language were absent, could the appellee collect the judgment in full once and later again collect all of it or some part of it from one or the other of the two unions against whom the judgment runs? That language but accurately describes a joint and several judgment that the trial court was without jurisdiction to grant.

In its printed brief the appellee attempted to defend the joint and several judgment by saying that a refusal

to sustain it in that form would be “illogical.” In the oral argument appellee’s counsel only said that to refuse to sustain the joint and several judgment would be “inequitable.” The sufficient answer to that is that we are not dealing with questions of theoretical logic or abstract questions of equity. If the appellee is not within the four corners of the jurisdictional statute that it invoked when it filed its action in the District Court, it avails it nothing to be almost on the right side of the jurisdictional fence. If it is not entirely within the limited jurisdiction granted by Section 301 of the Labor Management Relations Act, then it is simply a case of the appellee being in the wrong court with the wrong kind of a case. The appellee’s plea is fully answered by the decision of the Supreme Court of the United States in *Montgomery Building & Construction Trades Council et al. v. Ledbetter Erection Company, Inc.*, 344 U.S. 178, 97 L.ed. 204, also a case arising under the Labor Relations Act. There a labor union, for supposed equitable or hardship reasons, sought to prevail upon the Supreme Court to take jurisdiction of a case not clearly within the applicable jurisdictional statute. In declining to do so, the court said:

“However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that.” (344 U.S. p. 181, 97 L.ed. p. 207)

Appellants’ Specification of Error V Concerning the Damage Award

This specification is discussed in the opening brief, pages 61-71, in the appellee’s brief, pages 55-66, and in

our reply brief, pages 32-35. The court disposes of it by stating at page 11 of the opinion that:

“Appellants’ specifications of error 5 contends that the award of \$147,284.41 as damages is excessive. A detailed statement of all of the claimed items of damage would unduly lengthen this opinion. Suffice it to say that we have examined the record and there is sufficient evidence to support each item of damage included in the total amount.”

The court having failed to disclose why it thinks appellants’ objections to particular items going to make up the aggregate judgment are without merit, it would serve no purpose to now repeat what has already been said in the opening and reply briefs. However, we wish to make it clear that we do not concede the correctness of the court’s disposition of this specification of error and reserve the right to question it if a rehearing *en banc* is granted.

Appellee’s counsel in their printed brief made no serious attempt to answer the arguments we submitted in support of some of our several specifications of error but stated at pages 2-3 of their brief that they would rely upon the court’s own study of the record and their later oral argument. Not being mind readers, we could not anticipate what would be said on the oral arguments and not disclosed in appellee’s printed brief. Hence, in our reply brief we suggested (pages 30-31) that on the argument appellee’s counsel, without equivocation or evasion, answer six questions which we there clearly stated.

1. We asked that they state whether or not it was their

claim that a federal enclave within the meaning of Article I, Section 8, Clause 17 of the U.S. Constitution cannot exist unless the federal jurisdiction is completely exclusive. On the oral argument no answer was made to that question but the opinion of the court is to the effect that the federal jurisdiction must be exclusive, else a federal enclave cannot exist. We think that that answer is clearly erroneous.

2. We suggested that appellee's counsel on the oral argument state what significance, if any, they accorded to the President's Executive Order No. 9816 of December 31, 1946, vesting full jurisdiction in the Atomic Energy Commission and the confirmation of that Executive Order by Section 241 of the revised Atomic Energy Act of 1954. On the oral argument, appellee's counsel disdained to answer that question. The answer given by the court is clearly erroneous for the reasons already stated.
3. We suggested to appellee's counsel that they state how they could justify the exclusion of evidence offered by the appellants and on their objection rejected by the court to show that when the contracts were being negotiated the parties did not intend to exclude the Hanford area. That question has not been answered by the appellee nor has it adequately been answered by the court in its opinion.
4. We asked that appellee's counsel state why, if the two labor contracts executed on December 19, 1955, and December 24, 1955, and effective January 1, 1956, as written, were intended to include the Hanford area, the Contractors' Committee headed by Mr. Sam C. Guess, its Executive Secretary, up to and including March 16, 1956, were bending every

effort to obtain an amendment to make those contracts applicable to the Hanford area. Appellee's counsel disposed of that inquiry by simply ignoring it, and the opinion of the court furnishes no answer.

5. Questions 5 and 6 appearing in the reply brief, page 31, really involve the same question, and that is, assuming that the appellants are liable to the appellee in some amount, where is the jurisdiction for a joint and several judgment? On the oral argument, appellee's counsel made no answer at all except to say that to refuse to give it a joint and several judgment would be inequitable, implying thereby that this court, by reason of supposed equitable considerations, can amend a jurisdictional statute. The court endeavors to answer this objection by stating that the actions are contractual in nature for the purpose of getting within the coverage of Section 301 of the Labor Management Relations Act of 1947 but that in applying the law to the facts proved, it is permissible to discard established principles of contract law and to the extent necessary substitute legal rules applicable only in tort cases.

Laying aside for the moment disputed questions of facts, if it can be said that the vital facts are seriously in dispute, the opinion filed on July 27, 1957, is erroneous for several reasons.

1. It misconstrues and misapplies Article I, Section 8, Clause 17 of the U.S. Constitution by holding in effect that a federal enclave cannot exist unless the federal jurisdiction is exclusive of all state jurisdiction.

2. It misconstrues and misapplies the Act of Congress of October 9, 1940 (40 USCA, Section 255) which furnished the only authority for the Secretary of War writing the letter of November 8, 1943 (Ex. 20) to the Governor of the State of Washington.
3. It fails to give effect to the Atomic Energy Act of 1946 as amended and the Executive Order No. 9816 issued December 31, 1946, by the President as specifically directed by that Act of Congress.
4. It misconstrues and misapplies Rule 20-A, Federal Rules of Civil Procedure, which furnished the only authority for joining the two local unions in a single action and is in direct conflict with the decision of the United States Court of Appeals of the District of Columbia (*Lansburgs & Bros. Inc. v. Clark*, 127 F.(2d) 331) which correctly construes that rule.
5. It misconstrues and misapplies Section 301 of the Labor Management Act of 1947 (Taft-Hartley Act) and in effect is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit (*Rock Drilling, etc. v. Mason*, 217 F.(2d) 687) which correctly construes that Act.
6. When Rule 20-A, Rules of Civil Procedure, and Section 301 of the Labor Management Act of 1947 are read together, there is no authority for a joint and several judgment even though it be conceded that one local union or the other local union is liable to the appellee in some amount.

In submitting this petition for a rehearing *en banc*, we realize that it is more lengthy and detailed than would ordinarily be acceptable to the court. We believe

it is justified in this case, not primarily because of the excessive judgment against these two local unions, but more particularly because of questions of law involved and arising out of the Constitution and statutes of the United States.

Rule 23 of this court, the pertinent provisions of the Federal Judiciary Act, and the decision of the United States Supreme Court in *Western P.R. Corp. v. Western P.R. Corp.*, 345 U.S. 247, 97 L.ed. 986, pursuant to which Rule 23 in its present form was adopted, clearly contemplate that from time to time cases will arise that merit consideration of the entire court. We respectfully submit that this is one of those cases.

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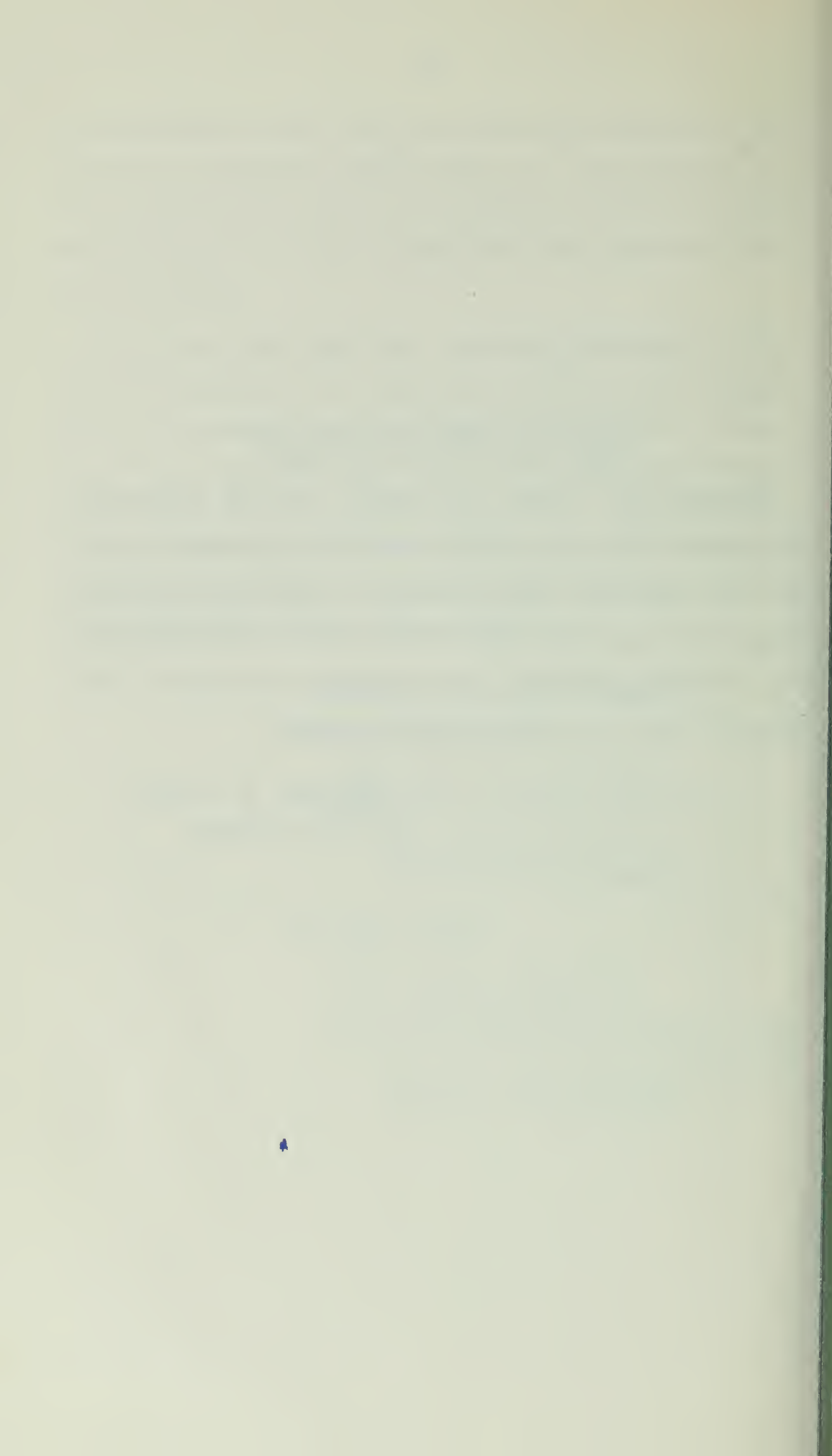
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CERTIFICATE OF COUNSEL

STEPHEN V. CAREY, of counsel for the appellant, Teamsters Union Local 839, and R. MAX ETTER, counsel for the appellant, International Union of Operating Engineers Local 370, each certifies that in his judgment the foregoing petition for rehearing *en banc* is well founded and is not interposed for delay.

STEPHEN V. CAREY
R. MAX ETTER



No. 16,104 ✓

United States Court of Appeals
For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
a corporation,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation, and
SHIPOWNERS & MERCHANTS TOWBOAT CO.,
LTD., a corporation, Claimant of the Tug
Sea Scout,

Appellees,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO.,
LTD.,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation,

Appellee.

OPENING BRIEF FOR APPELLANT
SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.

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**United States Court of Appeals
For the Ninth Circuit**

STATES MARINE CORPORATION OF DELAWARE,
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Appellant,

vs.

VICTORY CARRIERS, INC., a corporation, and
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Appellees,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD.,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation,

Appellee.

**OPENING BRIEF FOR APPELLANT
SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.**

JURISDICTION.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from an interlocutory admiralty decree of the United States District Court for the Northern District of California, Southern Division, made and entered on June 3, 1958 (Tr. 47). Notice of appeal was filed by this appellant on June 17, 1958 (Tr. 50), within the fifteen day period fixed by section 2107 of Title 28, U. S. Code.

The action was commenced on the admiralty side of the District Court by a libel *in rem* and *in personam* (Tr. 3), filed by appellee Victory Carriers, Inc., against appellant Shipowners & Merchants Towboat Co., Ltd. and its tug Sea Scout. Said appellant impleaded appellant States Marine Corporation of Delaware by petition under Admiralty Rule 56 (Tr. 13).

The admiralty jurisdiction of the District Court is founded on Art. III, sec. 2 of the United States Constitution and sec. 1333(1) of Title 28, U. S. Code. The appellate jurisdiction of the Court of Appeals for the Ninth Circuit is granted by the same section of the Constitution and by sections 41, 1291 and 1294 of Title 28, U. S. Code.

STATEMENT OF THE CASE.

On January 23, 1957, appellee Victory Carriers, Inc. was the owner of the S.S. LEWIS EMERY, JR. and appellant States Marine Corporation of Delaware (hereinafter called "States Marine") was her time charterer. On that date appellant Shipowners & Merchants Towboat Co., Ltd. (hereinafter called "Shipowners & Merchants") was engaged by States Marine to pull the EMERY away from her berth at Pier 92, Islais Creek, San Francisco. Shipowners and Merchants furnished the tugs Sea Scout and Sea Queen for that purpose. Garner H. Long, master of the tug Sea Scout, went aboard the EMERY to act as pilot, leaving the Sea Scout in command of her mate. As the EMERY proceeded away from the pier, under the impulse of her own engines and with

the assistance of the tugs, a collision occurred between the EMERY and the Sea Scout. The collision was the result of the combined faults of Captain Long, acting as pilot of the EMERY, and of the mate in charge of the Sea Scout.

When States Marine engaged Shipowners & Merchants it did so upon the understanding that the latter firm would provide tugs and a pilot only under condition that the contract of hire include its "pilotage clause" in the following form:

"When any pilot furnished by this company, including the master or other officer of any tug furnished to or engaged in the service of assisting or towing a self-propelled vessel, goes on board such vessel, whether or not the vessel has available for use or is making use of her own propelling power, it is understood and agreed that such pilot becomes the servant of that vessel and her owners in respect of all actions taken, orders given, or decisions made by him (or any omission thereof) while on board such vessel; and it is furthermore understood and agreed: (1) that the vessel and her owners will assume all liability for any loss or damage (including that suffered by any assisting tug) resulting from or arising out of the negligence or other fault of such pilot; (2) that neither this company nor such pilot nor any assisting tug, its owners, agents, charterers, operators or managers shall be liable, directly or by way of indemnity or otherwise, for any such loss or damage; and, (3) that each and all of the foregoing parties shall be indemnified and held harmless by the vessel and her owners with respect to any and all claims, by whomsoever asserted, arising by reason of such negligence or other fault.

“If any such vessel is not owned by the person or company ordering the tug and/or piloting service, it is understood and agreed that such person or company warrants its authority to bind the vessel and her owners to all the provisions of the preceding paragraph and agrees to indemnify and hold harmless this company and such pilot and any assisting tug, its owners, agents, charterers, operators or managers, and each of them, with respect to all losses, damages and/or expenses that may be suffered or incurred in consequence of such person or company not having such authority.” (Finding V, Tr. 41.)

After the collision Victory Carriers sued Shipowners & Merchants and the Sea Scout to recover for damage to the EMERY (Tr. 3). Shipowners & Merchants, as respondent and as claimant of the Sea Scout, answered the libel, alleging that the collision was caused solely by the fault of Captain Long and pleading the pilotage clause as a defense (Tr. 8). Shipowners & Merchants then impleaded States Marine, praying for indemnity pursuant to the pilotage clause in the event States Marine was not authorized to bind Victory Carriers to its terms (Tr. 13).

The District Court found that States Marine was not authorized to and did not bind Victory Carriers to the terms of the pilotage clause (Finding VII, Tr. 43), and accordingly ordered that Victory Carriers recover in full from Shipowners & Merchants (Interlocutory Decree, Tr. 47). The Court further found that Shipowners & Merchants, in dealing with States Marine, had relied on the latter's warranty of authority contained in the pilot-

age clause and that said warranty had been breached (Findings VI and VII, Tr. 43). Had States Marine been authorized to bind Victory Carriers to the pilotage clause, Shipowners & Merchants would have been liable for only half of the damage resulting from the collision, since it was caused by the combined faults of the pilot and the tug. The District Court therefore ordered States Marine to indemnify Shipowners & Merchants to the extent of one-half of the latter's total liability to Victory Carriers, that being the amount of loss and/or damage suffered by Shipowners & Merchants in consequence of States Marine's breach of warranty (Interlocutory Decree, Tr. 47).

States Marine has appealed from the decree for indemnity against it, and also from so much of the decree in favor of Victory Carriers as allows recovery against Shipowners & Merchants based upon the fault of the pilot (States Marine Notice of Appeal, Tr. 49). The latter aspect of States Marine's appeal has forced Shipowners & Merchants to appeal also, even though it is satisfied with the decree below. Under the factual finding of mutual faults by pilot and tug, from which no party has appealed, Shipowners & Merchants cannot escape liability for half of the damages; i.e., that portion legally attributable to the tug. It is immaterial to Shipowners & Merchants whether the ultimate liability for the pilot's half rests with States Marine, as it does under the decree below, or with Victory Carriers, as it will should States Marine's appeal on that point succeed. Shipowners & Merchants has appealed solely as a protective measure, to enable it to take advantage of any such reversal which may result from States Marine's appeal.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In finding that States Marine was not authorized to and did not bind Victory Carriers to the terms of the pilotage clause;
 2. In failing to find and hold that the terms of the time charter precluded Victory Carriers from recovering against Shipowners & Merchants for damages resulting from pilot negligence.
-

ARGUMENT.

Shipowners & Merchants offers no argument in support of its appeal except to state the self-evident explanation for its appearance as an appellant in the case:

If States Marine is successful in its contention that Victory Carriers is solely responsible for the negligence of the pilot, then the decree in favor of Victory Carriers against Shipowners & Merchants must be modified to allow Victory Carriers to recover only one-half its damages.

Dated, San Francisco, California,

March 30, 1959.

Respectfully submitted,

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*Proctors for Appellant Shipowners
& Merchants Towboat Co., Ltd.*

No. 16,104

United States Court of Appeals
For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
a corporation, *Appellant,*

vs.

VICTORY CARRIERS, INC., a corporation, and
SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD., a corporation, Claimant of the
Tug Sea Scout, *Appellees,*

and

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD., *Appellant,*

vs.

VICTORY CARRIERS, INC., a corporation,
Appellee.

OPENING BRIEF FOR APPELLANT
STATES MARINE CORPORATION OF DELAWARE.

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**United States Court of Appeals
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STATES MARINE CORPORATION OF DELAWARE,
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and

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LTD.,

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vs.

VICTORY CARRIERS, INC., a corporation,

Appellee.

**OPENING BRIEF FOR APPELLANT
STATES MARINE CORPORATION OF DELAWARE.**

This is an appeal to the United States Court of Appeals for the Ninth Circuit from an interlocutory admiralty decree entered by the United States District Court for the Northern District of California, Southern

Division, the Honorable Louis E. Goodman presiding, for full damages in favor of libelant, Victory Carriers, Inc. (hereinafter called "Victory Carriers" or "ship-owner") against respondent-petitioner, Shipowners & Merchants Towboat Co., Ltd. (hereinafter called "Red Stack" or "tugboat company") and in favor of respondent for half damages against respondent-impleaded, States Marine Corporation of Delaware (hereinafter called "States Marine" or "time charterer").

JURISDICTION.

This cause was begun on the admiralty side of the District Court by libel *in rem* and *in personam* filed by Victory Carriers as owner of the vessel SS LEWIS EMERY, JR. against the Tug SEA SCOUT and her owner Shipowners & Merchants Towboat Co., Ltd., for damage suffered by the vessel in collision with the tug on January 23, 1957 (R. 3-7). Shipowners & Merchants Towboat Co., Ltd., commonly known as "Red Stack", filed a petition under Admiralty Rule 56 (R. 13-20) claiming indemnification from time charterer States Marine for any damages assessed against Red Stack resulting from pilot error.

The cause was tried to the Honorable Louis E. Goodman on February 25 and 26, 1958. On March 3, 1958 the District Court filed a preliminary order indicating its intention to find that the collision resulted from the combined fault of the Red Stack pilot aboard the SS LEWIS EMERY, JR. and the operator of the Tug SEA SCOUT (R. 29-30) (reported at 1958 AMC 1173). After argument and briefing respecting the liabilities among the

parties which would derive from the proposed finding as to navigational fault, on May 12, 1958 the District Court filed its Order for Decree (R. 30-33) (reported at 164 F. Supp. 701 and 1958 AMC 1173) following which the District Court filed its Findings of Fact and Conclusions of Law (R. 39-46) on June 2, 1958 and the Interlocutory Decree holding Victory Carriers entitled to recover full damages from Red Stack and Red Stack entitled to recover one-half of such damages from States Marine was filed June 2, 1958 and entered June 3, 1958 (R. 47-49). Within 15 days thereafter, on June 17, 1958, States Marine filed its Notice of Appeal (R. 49-50) and Cost Bond on Appeal (R. 51-53).

Jurisdiction of this admiralty matter was vested in the District Court under Article III, Sec. 2 of the United States Constitution and 28 U.S.C. 1333 (1).

Jurisdiction of this Honorable Court of Appeals exists under 28 U.S.C. 41, 1292(3), 1294 and 2107, Notice of Appeal having been filed within 15 days from entry of the Interlocutory Decree (R. 49, 51).

STATEMENT OF THE CASE.

On the evening of January 23, 1957 Red Stack's Tug SEA SCOUT came in collision with Victory Carriers' Liberty type vessel LEWIS EMERY, JR. causing damage to the vessel. There was no damage to the tug. At the time of the collision, Garner H. Long, employed by Red Star as Master of the Tug SEA SCOUT, was on board the vessel SS LEWIS EMERY, JR. serving as pilot. Both the pilot of the vessel and the operator of

the tugboat were general employees of Red Stack. The District Court found that the collision was caused by the combined negligence of the pilot and of the operator of the Tug SEA SCOUT, which finding is not contested on this appeal.

At the time of collision the vessel LEWIS EMERY, JR. was under time charter to States Marine pursuant to written Charter Party entered into between Victory Carriers and States Marine under a standard form, known as "Government Form—Approved New York Produce Exchange" (Libelant's Ex. 16, R. 75). States Marine had ordered the undocking service which Red Stack was performing at the time of the collision, including the supplying of the Tug SEA SCOUT and Pilot Garner H. Long, in performance of States Marine's contractual obligation to Victory Carriers under Clause 2 of the Charter Party to "provide and pay for . . . Pilotages, Agencies . . ." (Finding IV, R. 41).

There is no claim that States Marine was negligent or that any act by States Marine or its employees contributed to the collision.

Victory Carriers' Libel (R. 3) basically claimed that the collision was caused by the fault of the Red Stack Tug SEA SCOUT while Red Stack's Answer (R. 8, 11) alleged that the collision resulted solely from the negligence of Red Stack employee Garner R. Long acting as pilot. The Impleading Petition (R. 13) of Red Stack against States Marine claimed contractual indemnification for damages that might be adjudged against Red Stack for negligence of Red Stack pilot Garner H. Long. In its formal Answer to the Libel (R. 20, 22) States Marine

alleged Victory Carriers' contractual undertaking to remain solely responsible for navigation of the vessel. In its Answer to the Impleading Petition (R. 23-28) States Marine denied that the pilotage clause of May 4, 1956 relied upon by Red Stack was the contract between the parties and denied Red Stack's allegations as to States Marine's warranty of authority and lack of authority to bind Victory Carriers to a pilotage clause (R. 27). States Marine affirmatively answered that Red Stack's negligent operation of its Tug SEA SCOUT barred Red Stack from any claim for indemnity it might otherwise have (R. 28).

It was Red Stack's contention in the District Court vis-a-vis States Marine that one half of the total collision damages were allocable to the negligence of the pilot and that such one-half should be recouped by Red Stack from States Marine on the grounds that (1) Victory Carriers could not legally have recovered full damages if Victory Carriers had been bound by a "pilotage clause", (2) that States Marine was contractually bound to Red Stack in the terms of a form letter dated May 4, 1956 and sent about that time by Red Stack to States Marine (R. 60, Respondent's Ex. C, R. 61-62), which read in pertinent part:

"If any such vessel is not owned by the person or company ordering the tug and/or piloting service, it is understood and agreed that such person or company warrants its authority to bind the vessel and her owners to all the provisions of the preceding paragraph and agrees to indemnify and hold harmless this company and such pilot and any assisting tug, its owners, agents, charterers, operators or man-

agers, and each of them, with respect to all losses, damages and/or expenses that may be suffered or incurred in consequence of such person or company not having such authority.”

(3) Victory Carriers was not bound to the pilotage clause because States Marine was not authorized to so bind Victory Carriers and (4) that the language of Respondent's Ex. C (R. 61-62) was such as to validly and legally entitle Red Stack to indemnity from States Marine.

States Marine urged in the District Court that the contractual undertaking of Victory Carriers to remain responsible for “the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account” (Libelant's Ex. 16, Clause 26, R. 75), was for the benefit of, and protected, Red Stack as a subcontractor, performing a function, “pilotage,” which States Marine under the Charter was required to “provide” (R. 33-39). States Marine further urged that it was authorized under the Time Charter to bind the vessel owner to whatever pilotage clause was required to enable States Marine as time charterer to perform its duty of “providing . . . Pilotages, Agencies . . .”. Evidence was presented at the trial to show that Victory Carriers during the twelve months immediately preceding the collision of January 23, 1957 had itself dealt with Red Stack, had received invoices from Red Stack for tugboat service (R. 79), and that all invoices sent out by Red Stack contained the form of pilotage clause imprinted on Impleaded Respondent's Ex. A (R. 66a) (testimony of witness Collar (R. 67-68)). General Steamship Cor-

poration, Ltd., of San Francisco, which had served as husbanding agent for other vessels of Victory Carriers calling in San Francisco during such preceding 12 months (R. 73-74, 80), according to Red Stack witnesses Collar had also been sent (R. 68-69) copies of Red Stack's letter dated May 4, 1956, Respondent's Ex. C (R. 61-62). It was the position of States Marine at the trial in the District Court that the pilotage clause, if any, which was contractually binding at the time of the collision was that clause which appears printed on the bottom of the invoice submitted by Red Stack to States Marine for the very services in question, Impleaded Respondent's Ex. A (R. 66a), which had been consistently used by Red Stack in its billings for all tugboat services during the 12 months immediately preceding January 23, 1957 (witness Collar R. 67-68) and which was identical to the clause in use on Red Stack's invoices at the time of the SS JULES FRIBOURG collision (R. 68) which gave rise to litigation between States Marine and Red Stack reported as *People of the State of California v. The Jules Fribourg* (N.D.Cal. 1956) 140 F. Supp. 333. In the *Jules Fribourg* case the U. S. District Court for the Northern District of California, Judge Louis E. Goodman, held such clause did not entitle Red Stack to indemnity from time charterer States Marine for collision damage resulting from error of a Red Stack tug master serving as pilot on board a time chartered vessel.

Red Stack was the only firm in the San Francisco Bay Area which offered a complete undocking service (R. 70) and the only company providing large horsepower deep draft tugs (R. 71).

The issue of primary general importance presented by this appeal is whether the time charterer of a vessel, regardless of the form of pilotage clause in use by the individual tugboat company, can be subjected to liability for collision damage suffered by the vessel through pilot error, by reason of its performing its contractual obligation with the vessel owner to order an undocking service. This primary issue, which is of considerable commercial importance, will depend on this Honorable Court's answers to the questions (1) did Victory Carriers remain responsible for navigation as to Red Stack which had been delegated to perform pilotage under the Time Charter by States Marine and (2) was States Marine authorized to bind, and was Victory Carriers therefore bound, to a pilotage clause by virtue of the provisions of the time charter that States Marine should "provide . . . Pilotage, Agencies . . ." while Victory Carriers should "remain responsible for navigation of the vessel, insurance, crew, and all other matters." In the context of the present case, affirmative answers to either of these questions would mean Red Stack not entitled to a decree against States Marine as any decree of Victory Carriers against Red Stack would necessarily arise from something other than States Marine's breach of the last paragraph of the pilotage clause of May 4, 1956 (R. 62), even if binding.

Issues which are of only secondary international commercial importance, because it is unlikely that precisely the same facts would recur in another case in another port, are (1) whether Red Stack carried its burden of proving that the claimed pilotage clause of May 4, 1956, Respondent's Ex. C (R. 61-62) was binding as *the* con-

tract with States Marine in view of (a) the two other pilotage clauses (R. 61, 66a), used and communicated by Red Stack to States Marine at and after the clause of May 4, 1956, i.e., whether the District Court erred in finding States Marine bound to a contract with Red Stack in the terms set forth in Respondent's Ex. C (R. 61-62) and (b) the monopoly position and unilateral method of attempted imposition of the contract by Red Stack (R. 67-68, 70-71); and (2) whether Red Stack (a) would have been able to limit its liability to Victory Carriers to one-half damages even under Respondent's Ex. C (R. 61-62) and (b) if so, whether Red Stack is entitled to indemnity against States Marine even under Respondent's Ex. C (R. 61-62) in view of Red Stack's independent negligent operation of the Tug SEA SCOUT which combined with the negligence of the pilot to cause the collision damage.

SPECIFICATIONS OF ERROR.

1. The District Court erred in failing to find and hold that Victory Carriers under the terms of the Time Charter was precluded from exacting damages from Red Stack for injury to Victory Carriers' vessel resulting from pilot negligence.

2. The District Court erred in finding (Finding VII, R. 43-44) that States Marine was not authorized to, and did not, bind Victory Carriers to a pilotage clause and that Victory Carriers was not contractually bound by a Red Stack pilotage clause.

3. The District Court erred in finding (Finding V, R. 41-43) that States Marine accepted and was bound by

the Red Stack pilotage clause dated May 4, 1956 (Respondent's Ex. C, R. 61-62).

4. The District Court erred in its implied finding, not expressly stated (cf. Finding VI, R. 43), that Red Stack was justified in relying upon its assumption that States Marine was bound by the warranty of authority contained in the pilotage clause dated May 4, 1956.

5. The District Court erred in failing to find that the Red Stack pilotage clause which appeared on the invoices for the services performed at the time of collision (Impleaded Respondent's Ex. A, R. 66a) was the Red Stack pilotage clause which governed the transaction.

6. The District Court erred in finding (Finding XIII, R. 45) that Red Stack's pilotage clause of May 4, 1956 (Respondent's Ex. C, R. 61-62) would have been legally effective to restrict Victory Carriers to a recovery of only one-half damages against Red Stack if Victory Carriers had been contractually bound by such clause.

7. The District Court erred in failing to find and conclude that the negligence of Red Stack in the operation of the Tug SEA SCOUT (Finding X, R. 44) precluded Red Stack from recovering from States Marine any part of the damages adjudged against Red Stack for the collision.

SUMMARY OF ARGUMENT.

If the decree of the District Court is affirmed this will be the first and only case in which a time charterer, such as States Marine, has ultimately been required to pay damages arising from collision. As maritime col-

lision damage claims are potentially perhaps the largest physical damage tort claims which come before the courts, and as time charterers are not entitled to limit liability, the decision of the District Court has had a seriously disconcerting effect on a commercial status relationship under which an important percentage of the world's waterborne commerce has been conducted for many years.

The decree of the District Court was clearly erroneous in that it failed to give effect to the overriding obligation of the shipowner, Victory Carriers, under clause 26 of the charter party (Libelant's Ex. 16, R. 75) "to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account." The cases have established that by reason of the overriding responsibility of the shipowner for navigation, States Marine as time charterer would not be liable for collision damage to the vessel resulting from negligence of one of State Marine's own employees supplied as pilot under the requirement of clause 2 of the charter party that States Marine "provide and pay for . . . Pilotages, Agencies . . .". The shipowner's contractual and relational responsibility for the navigation of the vessel includes responsibility for incidental services provided under the charter party by the time charterer, and used by the shipowners in navigation, not only when the services are performed directly by the time charterer but also when the performance is delegated to a subcontractor, in this case Red Stack.

In much the same vein, in that the error arose from the District Court's failure to give full effect to the time

charter, was the District Court's clear error in finding that States Marine was without authority to bind Victory Carriers to whatever pilotage clause had been contractually imposed by Red Stack. It is Red Stack's position that if the undocking service had been ordered directly by Victory Carriers, or by Victory Carriers' agent, General Steamship Corporation Ltd., Victory Carriers would have been bound to a pilotage clause under which Red Stack would have been free of liability to Victory Carriers for collision damage resulting from pilot negligence. But under the charter States Marine had authority, as agent, to bind Victory Carriers to whatever contracts were consistent with Victory Carriers' time charter obligation "to remain responsible for the navigation of the vessel, . . . and all other matters, *same as when trading for their own account.*" Victory Carriers had through its own agents employed Red Stack on several occasions during the preceding twelve months and the conclusion is inescapable, we believe uncontested, that if "trading for its own account" Victory Carriers would have been forced to accept whatever pilotage clause or release from liability Red Stack had succeeded in imposing on the San Francisco shipping community. No language of a printed time charter form designed to cover calls at all ports of the world could more aptly grant the time charterer, States Marine, the agential authority to bind the shipowner Victory Carriers to whatever navigational responsibilities it would assume if "trading for its own account" than the mandatory language of clause 2 of the charter party "the Charterers shall provide and pay for . . . Pilotages, Agencies . . ."

The remainder of the argument of appellant, States Marine, is directed to points which are unlikely to recur in other cases.

States Marine contends that the District Court erred in holding that Red Stack had succeeded in imposing on States Marine the pilotage clause of May 4, 1956 (R. 61-62) in light of the fact that then (printed language at foot of R. 61) and repeatedly thereafter (R. 66a, 67-68) Red Stack communicated to States Marine pilotage clauses under which States Marine could have no liability to Red Stack in the present case. Additionally the District Court erred in failing to give effect to the principles that (1) the contributing negligence of Red Stack in the operation of the Tug would, in itself, have entitled Victory Carriers to recover full damages from Red Stack and (2) Red Stack's breach of its implied contractual undertaking to operate its Tug SEA SCOUT in a seamanlike and safe manner, which failure contributed to the damage in question, not only bars Red Stack from any claim it might otherwise have against States Marine for indemnity for the negligence of Red Stack's pilot, but would entitle States Marine to indemnity against Red Stack.

ARGUMENT I.

SPECIFICATION 1. "THE DISTRICT COURT ERRED IN FAILING TO FIND AND HOLD THAT VICTORY CARRIERS UNDER THE TERMS OF THE TIME CHARTER WAS PRECLUDED FROM EXACTING DAMAGES FROM RED STACK FOR INJURY TO VICTORY CARRIERS' VESSEL RESULTING FROM PILOT NEGLIGENCE."

A time charterer is basically a shipper of goods, and in the ancient maritime codes was labeled the "merchant."¹ The time charterer in question is a usual, standard form which, with changes from time to time, has been in use for many years. Although the rights and obligations of the parties to a time charter or "charter-party" are spelled out in considerable detail in the individual contracts, as in this case, the status of a time charterer is largely relational. Under the Charter Party in the present case (Libellant's Ex. 16, R. 75) the shipowner, Victory Carriers, recognized its ancient relational obligation as shipowner by expressly agreeing in clause 1 to provide and pay for all crew expenses, insurance of the vessel, ship's stores and maintenance of the vessel and in clause 26 to remain responsible for "the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account." The items which States Marine agreed to provide and pay for are those traditional variable items whose total cost is determined by the voyages and ports of call selected by the time charterer. Such variable costs cannot accurately be estimated in advance for inclusion in the daily "hire" rate. The charterer's agreement to provide such

¹Cleirac, *Les Us. et Coutumes de la Mer* (1647), Observation to Article XI of the Laws of Oleron (30 Fed. Cas. 1177).

items is a matter of computation of price or rate of "charter hire" and does not alter the status of the parties, i.e., that of the time charterer as "merchant" and that of the shipowner as owner, navigator and operator of the vessel, even though many of the items which the time charterer provides and pays for, such as "fuel, . . . Port Charges, Pilotages, Agencies . . ." are items accepted, assimilated and employed by the shipowner, Victory Carriers, in discharge of its overriding undertaking to "remain responsible for the navigation of the vessel, . . . and all other matters, same as when trading for their own account."

The intent, history, and purpose of clause 2 of this particular form of charter party are excellently discussed in *Poor on Charter Parties*, 4th Ed., pp. 22-26. The nature and effect of the shipowner's contractual undertaking to remain solely responsible for matters affecting navigation is authoritatively stated by Wharton Poor, *Poor on Charter Parties*, 4th Ed., pp. 24-25:

"A time charter is not a demise of the vessel. The duty of navigation rests entirely upon the owner. For instance, even when a pilot is in the general employ of the charterer, nevertheless it is the owner and not the charterer who is liable for his negligence in navigating. So the charterer is not liable for the negligence of the tugs which he has employed to dock the vessel. And the general duty of loading and discharging is regarded as resting upon the owner. The rule is so absolute that the owner and not the charterer is liable to pay a fine and the costs of legal proceedings incurred by reason of the vessel's entering a Cuban port without a bill of health. Although the expense of procuring the bill of health would fall

upon the charterer, the duty of procuring it is one of navigation.”

In light of the ancient background and the overriding desirability for uniformity in international maritime matters (which underlay the grant of exclusive admiralty jurisdiction to the federal judiciary²) it would be at least an anomaly if the status of the time charterer as “merchant,” free of responsibility for the navigation and operation of the vessel, were made subject to the local San Francisco exception imposed by the decree of the District Court.

In view of the express undertaking of Victory Carriers in the charter party (Libelant’s Ex. 16, R. 75) to “remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account,” it is clear that insofar as commercial realities are concerned (which realities the law recognizes rather than ignores unless against public policy³) the loss is one which should ultimately be borne by Victory Carriers if of a kind that would be borne by Victory Carriers if “trading for their own account.” The principle stated is *a fortiori* valid where the loss is one which the shipowner, through indirection, is attempting to pass on to the merchant-time charterer States Marine.

²Hamilton, “The Powers of the Judiciary.” The Federalist No. 80 (McLean’s Ed. 1788).

³*The Columbian Ins. Co. v. Ashly & Stribling* (1839) 13 Pet. 331, 10 L. Ed. 186—Dealing with the relational obligations of vessel and cargo for general average as developed by ancient usage. *Seas Shipping v. Sieracki* (1946) 328 U.S. 85 at 94; 90 L. Ed. 1099 at 1106.

In ordering the undocking service provided by Red Stack, States Marine was doing only that which was authorized and required of it by Clause 2 of the charter party. The shipowner, Victory Carriers, remained responsible for the damages and risks of faulty navigation, even though such faulty navigation might in fact be that of a pilot directly employed by the time charterer, States Marine and provided by States Marine at States Marine's expense under the charter to assist the shipowner in performance of his duty and responsibility to navigate the vessel.

As was stated in the *Black Gull* (Arbitration) 1947 AMC 156:

“In my opinion, the fact that the charterer is also the general employer of the pilot does not render the charterer liable for the pilot's acts while the latter is employed by the shipowner in performing its duty to navigate the vessel, unless the pilot is obviously incompetent. If the owner is to remain responsible for navigation, the pilot in navigating the vessel is in the owner's employ although under general employ of the charterer.”

To the same effect are the opinions of the Court of Appeals for the Second Circuit in:

The Martin Kalbfleisch (2 Cir., 1893), 55 Fed. 336.

The Volund (2 Cir., 1910) 181 Fed. 643.

Munson S.S. Line v. Glasgow Nav. Co. (2 Cir., 1916) 235 Fed. 64.

and of the Fourth Circuit in:

Bramble v. Culmer (4 Cir., 1897) 78 Fed. 497.

The proposition is well founded in our law that the absolute non-delegable responsibility undertaken by Victory Carriers to “remain responsible for navigation” extends not only to the time charterer, States Marine, when it is performing its obligation of providing “pilotages” through its own employees but also to the corporate supplier or agent, Red Stack, to whom States Marine delegated its obligation under the contract to provide un-docking service. This is a matter of interpretation of the contract (Libelant’s Ex. 16, R. 75) which is particularly clear in a situation such as the present where an attempt is being made to pass to States Marine a loss of a type which Victory Carriers has expressly agreed it would bear alone.

On April 20, 1959 the United States Supreme Court in *Robert C. Herd & Company v. Krawill Machinery Corporation* under Docket No. 276 (reported at 27 Law Week 4257) affirmed the holding of the Court of Appeals for the Fourth Circuit in *Herd v. Krawill Machinery Corp.* (4 Cir. 1958) 256 F. 2d 946 that a provision in the shipowner’s bill of lading which limited the shipowner’s liability to \$500 per package, but which did not refer to the stevedoring contractor, was not designed for the benefit of anyone except the shipowner and did not operate to limit the liability of the negligent stevedoring contractor to the cargo owner. The bill of lading provision considered by the U. S. Supreme Court in the *Herd* case provided only that “the carrier’s liability, if any, shall be determined on the basis of \$500 per package.” Such a limited contractual provision is a far cry from the sweeping, all inclusive undertaking of the shipowner, Victory Carriers,

in the present case, under clause 26 of the Charter Party (Libelant's Ex. 16, R. 75) "To remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account."

As the Supreme Court said in the *Herd* case, referring to the restricted language of the bill of lading provision there in question:

"There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract. Since they did not do so, it follows that the provisions of the bill of lading did 'not cut off [respondent's] remedy against the agent that did the wrongful act.' "

The relationships and cross relationships arising from the performance of a time charter are such that it has long been recognized by the courts, that the contractual privileges obtained by one party are intended to, and do, extend to the benefit of those to whom a portion of the performance has been delegated.

In *Elder, Dempster & Co., Ltd. and others v. Paterson, Aochonis & Co., Ltd.* [1924] A.C. 522; (1924) 18 Ll. L. Rep. 319, a case which also involved a time charter relationship, the House of Lords (Viscount Cave, Lord Dunedin, Lord Sumner and Lord Carson; Viscount Finlay agreeing on this point but dissenting on the other grounds) held, against the shipper's contention to the contrary, that the shipowner, although not a party to the

bill of lading was protected by the provision in the bill of lading between the shipper and the charterer exempting from liability for damage to the goods resulting from bad stowage.

As Viscount Cave said in his opinion:

“It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton, L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals.” Id., [1924] A.C. 522, 534; (1924) 18 Ll. L. Rep. 319, 321.

In *Wilson v. Darling Island Stevedoring and Lighterage Company Ltd.* (1936) 1 Ll. L. Rep. 346, 363 Justice Fullagar of the High Court of Australia, while declining to apply a provision of the shipowner's bill of lading to the benefit of a stevedoring contractor, in discussing the *Elder, Dempster* case said:

“It turned, in my opinion, on the very special and peculiar relationships which are created when goods are consigned to be carried on a chartered ship.”

Among the many cases, including a recent decision of this Honorable Court, which have held the subcontractor or agent within the protection of the principal's contractual or relational privilege or immunity are:

Twentieth Century Delivery Service v. St. Paul Fire and Marine Ins. Co. (9 Cir., 1957) 242 F. 2nd 292 at 297. A terminal delivery company performing the delivering service for an air freight line held entitled to the limitation of liability stated in the air line bill of lading.

The South Star (2 Cir., 1954) 115 F. Supp. 102, 210 F. 2nd 44. A stevedoring contractor held entitled

to the benefit of the provision in the shipowner's bill of lading governing the time for filing suit.

Berger v. 34th Street Garage (1958) 3 N.Y. 2d 701, 148 N.E. 2d 883. A garageman to whom a trucker had entrusted goods was held entitled to the benefit of the limitation of liability provisions of the trucker's contract with the shipper.

Herzog v. Mittleman (1937) 155 Ore. 624, 65 P. 2d 384. A guest held entitled to the benefit of the Oregon automobile "guest" statute when himself driving at request of host owner as against claim of another injured guest.

Maghee v. The Camden & Amboy RR Co. (1871) 45 N.Y. 514, 520. A carrier selected to perform part of the contract of carriage entered into by the original carrier held entitled to the benefit of the provisions therein contained limiting liability although not a party thereto.

Schoeffler v. United Parcel Service of N.Y. (1950) 277 App. Div. 569, 571, 101 N.Y.S. 2nd 451. The parcel delivery service which lost the plaintiff's furs held entitled to the benefit of the limitation of liability provision of the contract between the plaintiff and the fur storage company, whose contract the parcel delivery service was in part performing. Accord: *Employers Fire Insurance Co. v. United Parcel Service* (1950) 80 Ohio App. 477, 99 N.E. 2nd 794.

Ivy H. Smith v. Warffemius (1953) 201 Md. 367, 93 A. 2nd 764. A contractor cutting timber under contract with an electric company held not liable to the landowner where the cutting of timber was

permitted by an easement held by the electric company.

Wilder v. Pennsylvania R. Co., 245 N.Y. 36, 156 N.E. 88. An exemption from liability provision in a railroad's pass form held to protect the railroad terminal operator. Accord: *Hall v. North Eastern R. Co.* (1875) L.R. 10 Q.B. 437; *Bicknell v. Grand Trunk R. Co.* (1899) 26 Ontario App. Rep. 431; but cf. *Parker v. Bissonette*, (1943) 203 S.C. 155, 26 S.E. 2nd 497.

Commercial Credit Corp. v. Harris (1950) 227 S.W. 2nd 886. A finance company as agent of lienor can repossess free of tort liability where principal would be so privileged.

The principle of the foregoing authorities is accorded full recognition in the 1958 edition of Secs. 345 and 347 of the American Law Institute Restatement of the Law of Agency (2nd) which has recently been revised to read as follows:

“Sec. 345. *Agent Exercising Privileges of Principal.*

An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have an agent do it and has authorized the agent to do it.”

“Sec. 347. *Immunities and Standard of Care of Principal.*

(1) An agent does not have the immunities of his principal although acting at the direction of the principal.

(2) Where, because of his relation to a third person, a master owes no duty, or a diminished duty, of care, a servant in the performance of his master's work

owes no greater duty, unless there has been reliance by the master or by a third person upon a greater undertaking by the servant.”

“Comment on Subsection (2) :

. . . An employer may by contract relieve himself from liability for ordinary negligence to purchasers, bailors and beneficiaries. In all of such cases, a servant or other agent is not required to meet a higher standard than that required of the principal . . .”

It is respectfully submitted that the provisions of the charter party, the relationship between the parties, the principle of the foregoing cases including the decision of this Honorable Court in the *Twentieth Century Delivery Service* case as well as the recently revised pertinent sections and comments of Agency 2nd, all affirm that the privilege under the terms of the charter party of States Marine extended to protect Red Stack from liability to Victory Carriers for collision damage resulting from pilot negligence while Red Stack was performing the pilotage function delegated to it by States Marine under the charter party. There is nothing in the recent decision of the U. S. Supreme Court in the *Herd* case which would indicate disapproval of the principle as stated both by the foregoing cases and by Agency 2nd. On the contrary the language in the *Herd* case makes clear that the Court would extend the benefit of the time charter provision to the tugboat company. Not only the wording of the time charter itself but the very existence of the present litigation make clear that the contractual undertaking of the shipowner, Victory Carriers, to remain responsible for navigation must extend not only to States Marine but

to Red Stack to assure States Marine itself of the benefit of such provision.

ARGUMENT II.

SPECIFICATION 2. "THE DISTRICT COURT ERRED IN FINDING (FINDING VII, R. 43-44) THAT STATES MARINE WAS NOT AUTHORIZED TO, AND DID NOT, BIND VICTORY CARRIERS TO A PILOTAGE CLAUSE AND THAT VICTORY CARRIERS WAS NOT CONTRACTUALLY BOUND BY A RED STACK PILOTAGE CLAUSE."

In the context of the present case the loss remains upon Victory Carriers if, assuming the validity of such "pilotage" clause, a pilotage clause of Red Stack was binding upon Victory Carriers.

Victory Carriers had itself dealt with Red Stack during the twelve months before the collision and had received Red Stack invoices (R. 79) which contained the Red Stack "pilotage clause" (R. 67-68) which appears at the bottom of Impleaded Respondent's Ex. A (R. 66a). A party to a contract impliedly receives from the other party the authority (or agency) necessary to perform the contract. in accordance with its terms.⁴ In the present case, under the terms of the Charter Party, States Marine was obligated to provide and pay for an undocking service, as well as "Pilotages, Agencies," but the responsibility for navigation, including the responsibility for piloting during the period of undocking clearly remained the sole responsibility of Victory Carriers "as when trading for their own account." There is no intimation that States

⁴Mechem, *Outlines of Agency*, 3rd Ed. §§100, 101; *Leroy v. Beard* (1850) 49 U.S. (8 How.) 451, 12 L. Ed. 1151.

Marine was in any way negligent or improvident in ordering such undocking service from Red Stack. In fact the record indicates that the undocking service for the time in question could have been obtained only from Red Stack (R. 70-71). In such circumstances there is only one reasonable construction of the Charter Party, and of the relationship between Victory Carriers as shipowner and States Marine as merchant-time charterer. That construction is that States Marine was obligated to provide and pay for an undocking service to be used by Victory Carriers in navigating the vessel and in so doing was authorized to bind Victory Carriers to such contractual provisions consistent with Victory Carriers' contractual undertaking to "remain responsible for the navigation of the vessel," as might be reasonably necessary for the securing of such undocking service for Victory Carriers "same as when trading for their own account" (Libellant's Ex. 16 Clause 26, R. 75).

States Marine's contention that it was authorized to bind Victory Carriers to whatever pilotage clause Red Stack had succeeded in imposing on the San Francisco shipping community would indicate a result contrary to that reached by the Court of Appeals for the Second Circuit in the *West Eldara* (1939) 104 F. 2d 670, modifying 101 F. 2d 45, cert. den. 308 U.S. 607. There are three reported decisions in the *West Eldara*. The first decision, by the District Court, is reported at 1938 AMC 282. The facts as reported in the opinion of the District Court indicate that the time charterer arranged for towage and that the vessel, as here, was damaged while being docked through negligence of the tug master aboard the vessel

serving as docking master or pilot. The vessel owner sued both the time charterer and the towing company for the damage. The District Court held that the towing company's pilotage clause was not binding on the vessel owner, that the vessel owner, accordingly, was entitled to recover its damages from the towing company but that the towing company was entitled to indemnity from the time charterer, apparently on the ground that the time charterer had dealt with the towing company as principal.

In the first decision of the Court of Appeals for the Second Circuit, reported at 101 F. 2d 45, the Court reversed, holding that the shipowner had no right to recover from anyone on the theory that the owner was responsible for navigation and that the owner's acquiescence in the performance of pilotage services by the tug master rendered the pilot in effect the servant of the vessel while performing such services.

In the second decision of the Court of Appeals for the Second Circuit, reported at 104 F. 2d 670, 671, the Court modified its prior holding, and the decision of the District Court, to hold that the vessel owner was entitled to recover full damages from the towing company, but that the towing company was not entitled to indemnity from the time charterer.

It is significant that the Court of Appeals for the Second Circuit did not give any direct discussion in either of its opinions in the *West Eldara* case to the question here involved, i.e., whether the time charterer in ordering an undocking service under the authority of Clause 2 of the time charter requiring the time charterer to "... provide and pay for ... Pilotages, Agencies ..."

was authorized to bind the owner to a pilotage clause to which the shipowner would have been bound if ordering such service "when trading for its own account."

In its first opinion 101 F. 2d 45 at 48 the Court passed over the question, which was moot on the view which the Court then took of the case, saying (at page 48):

"*Conceding* that the charterer had no authority to bind the owner by its engagement with the towing company still the owner's representative on the ship, the master, acquiesced in and consented to Capt. Cregan's coming on board and directing the vessel's navigation while docking . . . retention of control over navigation of the vessel made Cregan's acts its own." (Emphasis supplied).

In its second opinion in the *West Eldara* case, on rehearing, reported at 104 F. 2d 670, 671 the Court of Appeals for the Second Circuit gave the following consideration to the question of the time charterer's agential authority to bind the vessel owner to a pilotage clause:

"Upon the facts as stated in the previous opinion, the *West Eldara*, 101 F. 2d 45, with which familiarity is now assumed, we *held* that the pilotage clause was not binding upon the shipowner. This is so because the charterer was not the agent of the owner in contracting with the towing company to dock the vessel. The *NIELS R. FINSEN*, D.C., 52 F. 2d 795; The *Kate*, 164 U.S. 458, 17 S.Ct. 135, 41 L. Ed. 512." (Emphasis supplied).

The Court of Appeals for the Second Circuit having treated its *arguendo* concession in its first opinion as a "holding" then, in its second opinion, proceeded to hold that the vessel owner's acquiescence in the presence of a

pilot did not render the pilot the sole employee of the vessel owner and that the time charterer had not warranted anything to the towing company in merely ordering tug service.

It is interesting to note that the only citations given by the Court of Appeals for the Second Circuit in its second opinion with respect to the agency of the time charterer were the *Niels R. Finsen*, 52 F. 2d 795, in which case at page 799 the Court had said:

“If, on the other hand, the pilotage clause were to be held binding on the owners, this could be only on the assumption that the clause was such a customary one or even such a universal one in towing work in New York Harbor that the owners, by stipulating that the charterer should provide pilotage, consented to have their ordinary rights abridged by the pilotage clause.”

It should be noted that in the *Niels R. Finsen* case the determination and discussion as to the agential authority of the time charterer to bind the vessel owner to the towing company's pilotage clause was determined in a vacuum as the towing company was insolvent and the vessel owner's only practical recourse was against the time charterer. The vessel owner, of course, was denied recovery against the time charterer on the grounds that if the owner were bound to a pilotage clause he had not been harmed as such binding would have been in accordance with his authorization and on the other hand if he were not bound he of course had not be harmed.

The other case cited by the Court of Appeals for the Second Circuit in its second opinion in the *West Eldara*

case was *The Kate* (1896) 164 U.S. 458, 41 L. Ed. 512. It was the holding of the U. S. Supreme Court in *The Kate* that as to a person who knew or should have known that under the time charter the charterer was obligated to pay for fuel the time charterer lacked sufficient authority to impose a lien on the vessel in favor of the supplier for coals furnished at the charterer's request. It is not States Marine's contention in the present case that it had authority to bind Victory Carriers to pay for items for which States Marine had expressly agreed to pay, but only that States Marine had authority to bind Victory Carriers to the assumption of responsibilities in connection with the navigation of the vessel consistent with Victory Carriers' express contractual undertaking "to remain responsible for the navigation of the vessel . . . same as when trading for their own account." The holding in *The Kate* was reversed by the U. S. Supreme Court in *Damp, Danneborg v. Signal Oil Co.* (1940) 310 U.S. 268, 84 L. Ed. 1197 to give effect to the Maritime Lien Act of 1920 (46 USC Sec. 971 et seq.) where the time charter did not contain an express prohibition against the imposition of liens upon the vessel by the time charterer.

In the *People of the State of California v. the SS Jules Fribourg* (N.D.Cal. S.D. 1956) 140 F. Supp. 333 which involved a time charter collision situation similar to that presented by the present case and in which, like here, the time charterer was States Marine and the tug company was Red Stack, Judge Louis E. Goodman, relying on the *West Eldara* in discussion rejected, but not as a holding, the contention there made by Red Stack that the vessel owner was bound to the pilotage clause through the

time charterer's authority to so bind saying, at pages 339, 340:

“It is true that in providing a pilot, the charterer acted in behalf of the owner, since the charter imposed upon the owner the responsibility for navigation. Had the charterer provided for the pilotage of the *Jules Fribourg* by hiring an independent pilot, he would have become the servant of her owner, not the charterer. But, the charterer in dealing with the tug company did not act as the owner's agent. The charterer had the authority to provide for pilotage, but whatever undertaking it entered into in doing so was its own responsibility. It is not reasonable to imply from the charterer's authority to provide a pilot, the incidental authority either to waive any rights of the owner or to subject the owner to an employer's responsibility for the actions of a person who in fact was controlled by and owed primary allegiance to another employer. The implication of such authority would not be justified even if, as the tug company contends, the owner of the *Jules Fribourg* was aware that pilotage clauses such as the present one were in frequent use.”

In determining the *Jules Fribourg* case the District Court found that the particular negligence of the pilot which gave rise to the collision in that case was a negligence as to which the pilotage clause did not afford protection. Accordingly the question of whether or not the vessel owner was bound to the terms of the pilotage clause through the time charterer was moot to the determination of the case and as the District Court said (at p. 340) in considering Red Stack's contention that it was

entitled to indemnity against the charterer, States Marine, “for having breached a warranty of authority”:

“This contention is rendered moot by the conclusion that the pilotage clause did not cover the negligent act of Captain Markley.”

Neither in the *West Eldara* cases nor in the *Jules Fribourg* case, nor in any other case, has any court upon adversary consideration determined, as a ground necessary to decision,⁵ adversely to the contention here made by States Marine that as time charterer obligated under Clause 2 of Libelant’s Ex. 16 (R.75) to “provide and pay for . . . Pilotages, Agencies . . .” it was authorized to bind the vessel owner, Victory Carriers, to whatever assumption of responsibility for navigation of the vessel was exacted by the company providing the undocking service, Red Stack, to the extent that the responsibility to be assumed by the vessel owner under the pilotage clause was consistent with that expressly assumed by the vessel owner, Victory Carriers, in Clause 26 of Libelant’s Ex. 16 (R.75) “. . . to remain responsible for the navigation of the vessel . . . same as when trading for their own account.”

The conclusion suggested by States Marine would appear inescapable in view of the uncontradicted evidence that

⁵“The materials on which these conclusions are based are not esoteric. They are to be assessed, of course, according to time-honored rules for reading cases—that cases hold only what they decide, not what slipshod or ignorant headnote writers state them to decide; that decisions are one thing, gratuitous remarks another. A stew may be a delicious dish. But a stew is not to be made in law by throwing together indiscriminately decision and dicta . . .” Frankfurter, J., dissenting in *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85, 100, 99 L. Ed. 911, 922.

Red Stack was the only firm in the San Francisco Bay Area offering a complete docking service (R.70), was the only company in the San Francisco Bay Area offering the services of large horsepower deep draft tugs (R.71), and used the same form of invoice with the same form of pilotage clause that appears on Impleaded Respondent's Ex. A (R.66a) on all of its billings for all tugboat services during the twelve months preceding the date of the collision, January 23, 1957, including the several occasions during that period when Victory Carriers had itself through its own agents used Red Stack to assist in moving its vessels. (R.79).

Other provisions of the charter party (Libelant's Ex. 16 R.75), in addition to those previously noted, which clearly disclose the shipowner's intent to vest actual and ostensible agential authority in the charterer, States Marine are clause 8, “. . . The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; . . .” and clause 31 “Charterers' privilege of painting their house flag and markings on vessel's funnel . . .”

ARGUMENT III.

SPECIFICATION 3. "THE DISTRICT COURT ERRED IN FINDING (FINDING V, R. 41-43) THAT STATES MARINE ACCEPTED AND WAS BOUND BY THE RED STACK PILOTAGE CLAUSE DATED MAY 4, 1956 (RESPONDENT'S EX. C, R. 61-62)."

SPECIFICATION 4. "THE DISTRICT COURT ERRED IN ITS IMPLIED FINDING, NOT EXPRESSLY STATED, (cf. FINDING VI, R. 43) THAT RED STACK WAS JUSTIFIED IN RELYING UPON ITS ASSUMPTION THAT STATES MARINE WAS BOUND BY THE WARRANTY OF AUTHORITY CONTAINED IN THE PILOTAGE CLAUSE DATED MAY 4, 1956."

SPECIFICATION 5. "THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE RED STACK PILOTAGE CLAUSE WHICH APPEARED ON THE INVOICES FOR THE SERVICES PERFORMED AT THE TIME OF COLLISION (IMPLEADED RESPONDENT'S EX. A, R. 66a) WAS THE RED STACK PILOTAGE CLAUSE WHICH GOVERNED THE TRANSACTION."

The pilotage clause of May 4, 1956 (Respondent's Ex. 2, R. 61-62) under which Red Stack asserts its claim against the merchant time charterer States Marine, purports to have Red Stack and the negligent Red Stack pilot held harmless and indemnified by the merchant against damages caused by the negligence of the pilot. The drastic nature of the revision in relationships between pilot and merchant which Red Stack seeks to impose through its unilateral dealing is disclosed by comparison of the result sought by Red Stack against the traditional responsibility of pilot to merchant recorded in Article XXIII of the Laws of Olreón (12th Century):⁶

"If a pilot undertakes the conduct of a vessel, to bring her to St. Malo, or any other port, and fail of his duty therein, so as the vessel miscarry by reason of his ignorance in what he undertook, and

⁶Laws of Oleron, reprinted at 30 Fed. Cas. 1171 at 1180.

the merchants sustain damage thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithall; and if not, lose his head."

Even if this Honorable Court should find Victory Carriers entitled to recover against Red Stack for pilot negligence, the individual facts of the present case do not justify the transfer of such liability for collision damages from Red Stack to States Marine. In order to obtain recovery over against States Marine, Red Stack must establish that the "pilotage clause" dated May 4, 1956 (R. 61-62) was *the* contract between the parties. There is no claim of any express manifestation by States Marine of a consent to this particular pilotage clause. The District Court found (Finding V, R. 41) implied consent by States Marine from its previous dealings with Red Stack and the fact that States Marine had received a letter in the form of Respondent's Ex. C (R. 61-62). The record, however, shows that simultaneously with receipt of the form of pilotage clause upon which Red Stack relies, Red Stack, on its letterhead, communicated to States Marine another form of pilotage clause, under which it would not be entitled to claim indemnity against States Marine reading:

"When the captain or any other officer of any tug furnished to or engaged in the service of assisting or towing a self-propelled vessel, goes on board such vessel, or any other licensed pilot goes on board such vessel, whether or not such vessel has available for use or is making use of her own propelling power, it is understood and agreed that such tug captain, other officer or licensed pilot becomes the servant of the vessel assisted or towed, and her owner, in respect

to the giving of orders to any of the tugs furnished to or engaged in the assisting or towing service, and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot, nor the tugs, their owners, charterers, operators, managers and agents, shall be liable for any damage resulting therefrom.

“Consistent with its other commitments this company will endeavor to supply tug power upon receipt of order, but it shall not be responsible for delays, expense or damage caused by strikes, accidents, fire, weather or other cause of whatsoever nature beyond its control.”

(Language at foot of Respondent's Ex. C, R. 61).

In addition the record shows (Testimony of Collar, R. 64, 67-68) that still another form of pilotage clause, under which Red Stack would not be entitled to indemnity against States Marine, was used by Red Stack on all invoices sent by it to States Marine for tug services after May 4, 1956 up to and including the invoice of January 23, 1957 for the tug services involved in the collision in question (printed clause appearing at foot of Impleaded Respondent's Ex. A, R. 66a) which reads as follows:

“When the captain or other officer of any tug provided for, or engaged in, the service of furnishing tug power for, or assistance to, a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or other officer or licensed pilot become the servant of the owners of said vessel in respect to the giving of orders to any of the tugs provided for, or engaged in, said service and in respect to the handling

of such vessel, and neither those providing the tug or tugs nor the tug or tugs, their owners, agents or charterers shall be under any liability for damages resulting therefrom, and, further, that said tug or tugs and/or their owners, agents and/or charterers shall be under no liability for executing the orders of said tug captain or other officer or licensed pilot.

“This company agrees to supply tug power promptly consistent with other commitments, upon receipt of orders, but will not be responsible for delays, extra expenses or damages caused by strikes, accidents, fire, weather, or any other causes whether of similar or dissimilar nature beyond its control.”

It was clear error in such circumstances for the District Court to have found that the text of Red Stack’s unilateral letter of May 4, 1956 was *the* contract between States Marine and Red Stack.

The U. S. Supreme Court in *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85; 99 L. Ed. 911 held a release of liability clause, similar to those involved in the present case, invalid when attempted to be applied by a towing company to relieve itself of liability for negligent damage to its tow, saying at page 91:

“An increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions.”

In the *Bisso* case the Supreme Court then went on to distinguish the pilotage situation from the towage situation on the ground (pp. 92, 93 and 94) that pilots are extensively regulated by both state and federal governments and that their fees are fixed by law to avoid dis-

crimination in their charges. This basis of distinction does not exist in the present case with respect to the services as docking master performed by Captain Garner H. Long. There was, and is, no state or federal regulation of the charges imposed for docking service and docking service is in no sense "compulsory pilotage." In the facts of the present case there was no state or federal law or regulation requiring a "pilot" to be used in the docking of the SS LEWIS EMERY, JR., or regulating Red Stack's charges for such services. In the present case, much more clearly than in the *Bisso* case, the monopoly position of Red Stack in the furnishing of undocking services in the San Francisco Bay Area is disclosed (R. 70-71).

In his concurring opinion in *Boston Metals Co. v. SS Winding Gulf* (1955) 349 U.S. 122 at 127, 99 L. E. 933, at 938, Mr. Justice Frankfurter pointed out that practical necessity of strictly limiting pilotage clauses because of the hazard that the failure of cooperation of the towage company, if completely protected would give unjust results in litigation, saying:

"There are good reasons why this should not be undertaken, among them the fact that in a suit to which the tug is not a party it may be difficult to obtain the full assistance of the tug in establishing non-liability or avoiding an unfairly large recovery than might have been or subsequently is had against the tug."

The practical wisdom and perspicacity of Justice Frankfurter's comment is well evidenced by the present case in which Red Stack pleaded its own employee, Garner H. Long solely at fault for the collision (R. 11).

In view of the uniform use by Red Stack of the pilotage clause shown on Impleaded Respondent's Ex. A. (R. 66a) during the twelve months before the collision on January 23, 1597 (R. 67-68), under which clause there could be no liability of States Marine to Red Stack, it was clear error for the District Court to find that Red Stack had carried its burden of proving that by its unilateral dealings from a monopoly position it had succeeded in imposing Respondent's Ex. C (R. 61-62) as *the* contract between the parties.

ARGUMENT IV.

SPECIFICATION 6. "THE DISTRICT COURT ERRED IN FINDING (FINDING XIII, R. 45) THAT RED STACK'S PILOTAGE CLAUSE OF MAY 4, 1956 (RESPONDENT'S EX. C, R. 61-62) WOULD HAVE BEEN LEGALLY EFFECTIVE TO RESTRICT VICTORY CARRIERS TO A RECOVERY OF ONLY ONE-HALF DAMAGES AGAINST RED STACK IF VICTORY CARRIERS HAD BEEN CONTRACTUALLY BOUND BY SUCH CLAUSE."

Red Stack's claim for indemnity is premised solely on the second paragraph of its May 4, 1956 pilotage clause and in essence is a claim for reimbursement of the damages which it *allegedly would not have had to pay* if Victory Carriers had been a party to the first paragraph of such clause. Clauses virtually identical to that contained in the first paragraph of the pilotage clause of May 4, 1956 have been held by the Supreme Court to be mere "release from liability" clauses ineffective to constitute the pilot the "employee or servant" of the vessel owner.

In *United States v. Neilson (Christopher Gale Dauntless)* (1955) 349 U.S. 129, 99 L. Ed. 939, the U. S. Su-

preme Court considered the effect of a pilotage clause which provided that a tugboat captain or pilot going on board would become the:

“servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting services and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom.”

Against the contention of the tugboat company that the language of the pilotage clause was not against public policy and was effective to constitute the pilot the “servant” of the vessel owner, the Supreme Court held that the clause was effective only to release the tugboat company from liability to the vessel owner for damages resulting from negligence of the tugboat captain while serving as pilot.

In *Boston Metals Co. v. SS Winding Gulf* (1955) 349 U.S. 122, 99 L. Ed. 933, the U. S. Supreme Court held that regardless of the effectiveness between the parties of a towage clause, similar to a pilotage clause, the contractual arrangements between the towing company and the vessel owner were not sufficient to cause the negligence of towing company’s employees to be imputed to the vessel owner in litigation with third parties arising from damage to the vessel because of negligence of the towing company’s employees.

Applying the principle of the opinion of the U. S. Supreme Court in *United States v. Nielson*, supra, to any of the “pilotage” clauses in the present case the result

is that at most, if one of Red Stack's pilotage clauses had been binding on Victory Carriers, as between Red Stack and Victory Carriers, the Red Stack employee, pilot Garner H. Long, would be absolved of negligence. In such circumstance Victory Carriers would be entitled to recoup full damages from Red Stack by reason of Red Stack's negligent operation of its Tug SEA SCOUT. The rights of Victory Carriers against Red Stack, if Victory Carriers had been bound by a pilotage clause, would be no different than those of the innocent cargo in the *Chattahoochee* (1899) 173 U.S. 540, 43 L. Ed. 801 in which it was clearly established that under American law, cargo, even though having released its carrying vessel from liability for damage resulting from negligent navigation could nonetheless collect full damages from the noncarrying vessel in a mutual fault collision.

Victory Carriers and Red Stack were not strangers in the activity giving rise to the collision. Whether or not Victory Carriers was bound by a "pilotage" clause, Red Stack's obligation and duty to Victory Carriers should have been, and was, measured by a contractual standard calling for special skill and the exercise of a high degree of seamanship and care in the performance of its duties in assisting the SS LEWIS EMERY, JR. to undock.

"The tug is engaged to perform a task which she holds herself out as being capable of performing. When, through failure to take action to prevent coming into contact with a steamship propeller, the tug strikes and damages it, the tug is liable." *Grace Line v. The C. Hayward Meseck* (DCSDNY 1957) 150 F. Supp. 425, aff'd (2 Cir. 1957) 248 F. 2d 736.

It is thus clear that even if Victory Carriers had been contractually bound by a pilotage clause to release Red Stack from liability for pilot negligence, nonetheless Red Stack would have been liable in full damages to Victory Carriers by reason of the fact that the collision damage arose from and was contributed to by Red Stack's breach of its implied contractual obligation to operate its tug in a seamanlike and safe manner.

Weyerhaeuser v. Nacirema (1958) 355 U.S. 563, 2 L. Ed. 2d 491.

Ryan v. Pan-Atlantic (1956) 350 U.S. 124; 100 L. Ed. 133 at 142.

Mowinckels v. Commercial Stevedoring Co. (2 Cir. 1958) 256 F. 2d 277.

Crumady v. Joachim Hendrik Fisser (1959) U.S., 3 L. Ed. 2d 413.

Accordingly Red Stack has suffered no damage by reason of States Marine's failure so to bind Victory Carriers, if it did so fail.

ARGUMENT V.

SPECIFICATION 7. "THE DISTRICT COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT THE NEGLIGENCE OF RED STACK IN THE OPERATION OF THE TUG SEA SCOUT (FINDING X, R. 44) PRECLUDED RED STACK FROM RECOVERING FROM STATES MARINE ANY PART OF THE DAMAGES ADJUDGED AGAINST RED STACK FOR THE COLLISION."

Red Stack is pursuing States Marine exclusively on a contractual basis. In so far as Red Stack relies upon contract, an essential implied provision of that contract was that Red Stack would perform the undocking serv-

ice and would operate its tugboat in a seamanlike and safe manner so as to avoid damage or disadvantage to its employer. *Grace Line v. The C. Hayward Meseck* (DCSDNY 1957) 150 F. Supp. 425, aff'd (2 Cir. 1958) 248 F. 2d 736. Red Stack, however, operated its tugboat in a negligent and improper manner which contributed to the collision. The cases hold a contractor, such as Red Stack, bound to indemnify its principal where the principal, even though negligent, suffers damage by reason of the contractor's improper performance of its obligation, *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.* (1958) 355 U.S. 563, 2 L. Ed. 2d 491, but the rule is that a party who would otherwise be entitled to contractual indemnification, as Red Stack claims here, forfeits such right if its independent negligence (in this instance the negligent operation of the Tug SEA SCOUT) contributed to the damage for which indemnification is sought. *Amer-ocean Steamship Company v. Copp* (9 Cir. 1957) 245 F. 2d 291.

CONCLUSION.

Appellant, States Marine, respectfully submits alternatively (1) that Victory Carriers was not entitled to recover from Red Stack for pilot negligence but (2) that Victory Carriers was in any event entitled to recover full damages from Red Stack by reason of the negligence of Red Stack in operation of the Tug SEA SCOUT and (3) that Red Stack had not succeeded in contractually imposing the pilotage clause of May 4, 1956 on States Marine. In either event Red Stack suffered no damage from States Marine's alleged failure to bind Victory

Carriers to the pilotage clause of May 4, 1956, and the decree of the District Court requiring States Marine to pay to Red Stack one-half of the damages adjudged against Red Stack in favor of Victory Carriers accordingly should be reversed with mandate to the District Court to enter decree in favor of States Marine with costs.

Dated, April 30, 1959.

Respectfully submitted,

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FRANCIS L. TETREAUULT,

Attorneys for Appellants.

(Appendix A Follows.)

Appendix “A”

Appendix A

INDEX RE ADMISSION OF EXHIBITS PER RULE 18(2) (f).

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No. 16,104

In the

United States Court of Appeals

For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
a corporation,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation,
and SHIPOWNERS & MERCHANTS TOW-
BOAT Co., LTD., a corporation, Claimant
of the Tug SEA SCOUT,

Appellees,

and

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD.,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation,

Appellee.

Answering Brief of Appellee
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PAUL P. O'BRIEN, CLERK

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No. 16,104

In the

United States Court of Appeals

For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
a corporation,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation,
and SHIPOWNERS & MERCHANTS TOW-
BOAT Co., LTD., a corporation, Claimant
of the Tug SEA SCOUT,

Appellees,

and

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD.,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation,

Appellee.

Answering Brief of Appellee Victory Carriers, Inc.

JURISDICTION

The basis for the jurisdiction of this court is accurately set forth in the briefs of both appellants.

STATEMENT OF THE CASE

This case arises out of a collision between the Tug Sea Scout and the SS Lewis Emery, Jr. which occurred while the Sea Scout was assisting to undock the SS Lewis Emery, Jr. Libellant Victory Carriers, Inc. was the owner of the SS Lewis Emery, Jr. States Marine Corporation of Delaware (hereinafter referred to as "States Marine") was her time charterer under a standard form of charter known as the Government Form approved by the New York Produce Exchange. Shipowners & Merchants Towboat Co., Ltd. (hereinafter called "Red Stack") was the owner and operator of the Tug Sea Scout and the employer of her master and crew. The District Court found the collision due to the combined negligence of two employees of Red Stack; (1) the mate and operator of the tug, and (2) the master of the tug who was acting as pilot on the bridge of the SS Lewis Emery, Jr. The court found no negligence on the part of the master, officers or crew of the SS Lewis Emery, Jr. These findings are not disputed. Accordingly, the District Court entered a decree in favor of libellant Victory Carriers, Inc., owners of the SS Lewis Emery, Jr., against Red Stack.

We wish to make it clear at the outset that libellant Victory Carriers, Inc. did not sue States Marine, stated no claim against States Marine and no decree was entered against States Marine in favor of libellant Victory Carriers, Inc. States Marine was impleaded by Red Stack and is only involved by reason of a breach of a contract it entered into with Red Stack known as the "pilotage clause" resulting in an indemnity liability of States Marine to Red Stack for said breach. Appellant States Marine implies throughout its brief that Victory Carriers, Inc. has made a claim against it and states expressly on page 16 of the brief: "The shipowner through indirection, is attempting to pass

on (the loss) to the merchant time charterer (States Marine)".¹ It should be too obvious to require recitation that Victory Carriers, Inc. has no interest in States Marine's liability, if any, to Red Stack. Our cause is and always has been a simple action in tort against Red Stack.

The present appeal arises out of the attempts of States Marine to escape its breach of contract liability to Red Stack. One device it uses is to argue that Victory Carriers, Inc. should not have been granted full recovery against Red Stack in the first place because (1) Red Stack should derive some benefit from a clause in the charter between States Marine and Victory Carriers (to which Red Stack was not a party) providing that Victory Carriers remain responsible for navigation of the vessel; and/or (2) that Victory Carriers, Inc. was bound by the pilotage contract (to which it was not a party). These two contentions are presented as "Argument I" and "Argument II", respectively, in appellant's brief. We shall deal with them in similar order herein.

Not long ago States Marine was sued in this district by Red Stack on another but different form of Red Stack pilotage clause (*People of State of California v. Jules Fribourg*, 140 F. Supp. 333, 1956 A.M.C. 939). District Judge Goodman in that case held, among other things, that States Marine as time charterer had no authority to bind the vessel to a pilotage clause and did not impliedly warrant that it had such authority. It was stipulated at the trial of the present case that the States Marine time charter of the *Jules Fribourg* was identical in form with that of its charter of the *Lewis Emery, Jr.* (Tr. 74). Subsequent to the *Jules*

1. Appellant's irrelevant attempt to characterize itself as a "merchant" (p. 14, et seq. of Brief) should be viewed in the light of Clause 30 of the charter party, which gives States Marine the "privilege of painting its house flag and markings on vessel's funnel."

Fribourg decision, Red Stack revised its pilotage clause by adding, among other things, a warranty of authority which Judge Goodman had found lacking in the *Jules Fribourg*. This revised pilotage contract which the court below found States Marine made with Red Stack and upon which States Marine was held liable, reads as follows:

“When any pilot furnished by this company, including the master or other officer of any tug furnished to or engaged in the service of assisting or towing a self-propelled vessel, goes on board such vessel, whether or not the vessel has available for use or is making use of her own propelling power, it is understood and agreed that such pilot becomes the servant of that vessel and her owners in respect of all actions taken, orders given, or decisions made by him (or any omission thereof) while on board such vessel; and it is furthermore understood and agreed: (1) that the vessel and her owners will assume all liability for any loss or damage (including that suffered by any assisting tug) resulting from or arising out of the negligence or other fault of such pilot; (2) that neither this company nor such pilot nor any assisting tug, its owners, agents, charterers, operators or managers shall be liable, directly or by way of indemnity or otherwise, for any such loss or damage; and, (3) that each and all of the foregoing parties shall be indemnified and held harmless by the vessel and her owners with respect to any and all claims, by whomsoever asserted, arising by reason of such negligence or other fault.

“If any such vessel is not owned by the person or company ordering the tug and/or piloting service, it is understood and agreed that such person or company warrants its authority to bind the vessel and her owners to all the provisions of the preceding paragraph and agrees to indemnify and hold harmless this company and such pilot and any assisting tug, its owners, agents, charterers, operators or managers, and each

of them, with respect to all losses, damages and/or expenses that may be suffered or incurred in consequence of such person or company not having such authority.”

The warranty contained in the second paragraph of this clause is the portion which was added to meet the lack found in the *Jules Fribourg* case. States Marine claims that its liability on this warranty contract involves an issue “of considerable commercial importance”. It is difficult to see any prospective commercial importance in the result that is reached in this case. The contract speaks for itself. States Marine would have had no liability had it not entered into it; nor would it have had any liability had it entered into the form used in the *Jules Fribourg* situation or the other two pilotage clauses which it claims it in fact entered into in this case (Opening Br. pp. 8 and 9). There is no evidence that it was required to make this contract. It was not necessary to use Red Stack pilots. There are many independent Bay pilots in the San Francisco Bay area (Tr. 70). One was a witness in this case. There are other tug companies (Tr. 70-71). States Marine asserts that Red Stack is the only tug company with deep draft tugs. There is no evidence and no basis for finding that this particular type of tug or any tug is needed. It is the pilot who decides what tugs, if any, are needed and what type (the *Jules Fribourg*, supra). Charterer only provides the pilot. If States Marine selects a Red Stack pilot he would probably select a Red Stack tug. If an independent pilot were consulted he would decide what tug, if any, he needed and order it from Red Stack or some other tug company. The

trading limits of the charter to States Marine were broad and within these trading limits the ship was required to go to ports of charterer's selection. Clause 16 of the charter provided "the vessel has liberty to sail with or without pilots". Quite naturally, therefore, the charter left it to the charterer to decide what, if any, pilot should be used and to make its own contract for pilotage and pay for it.

Therefore, the case involves no issue of commercial importance. The holding of the court below is simply that States Marine did not enter into the contract it now wishes it had. The decision on this contract is not likely to have any progeny of importance, even with Red Stack. Apart from the fact that the use and form of pilotage contracts may vary in different ports, the record shows that the Red Stack clause has been repeatedly revised and altered as the necessities of its business and customers demand. It is for the charterer to decide what contract it wishes to make. The authorities are in agreement with the court below that States Marine as time charterer under this form of charter had no authority to bind the vessel owner to any of its pilotage clauses. We shall now proceed to demonstrate that the two major arguments of appellant States Marine are without merit.

I. ANSWER TO "ARGUMENT I" OF STATES MARINE

The Contention That Red Stack Should Have the Benefit of a Clause in the Charter Between States Marine and Victory Carriers, Inc. Is Unsound and without Merit.

The authorities are uniform that shipowners may recover from the pilot for his negligence:

Barbey v. SS Stavros, (D.C. Ore., 1959) 169 F.S. 897;
Chase v. Hammond Lumber Co., (9th Cir., 1935)
 79 F.2d 716, 1935 A.M.C. 1502;

The Eldena, (S.D. Tex.) 25 F.2d 312, 1928 A.M.C. 887;
The Dora Allison, (S.D. Ala.) 213 Fed. 645;
Burley v. Comp. de Nav. Fr., (9th Cir., 1912) 194 Fed. 335.

If the pilot is in the employ of a tug company, the pilot's negligence is imputed to the tug company and accordingly the shipowner may recover against the tug company absent being bound by a special release contract such as a pilotage clause:

Publicker Industries v. Tugboat Neptune Co., (3rd Cir., 1948) 171 F.2d 48;
The West Eldara, (2nd Cir., 1939) 104 F.2d 670; cert. den. 308 U.S. 607;
The Edward G. Murray, (2nd Cir., 1922) 278 F. 895;
The Dorset, (4th Cir., 1919) 260 F. 32;
The Algie, (S.D., Fla., 1936) 13 F. Supp. 834;
Robins Dry Dock & Repair Co. v. Navigacione Libera Triestina, S.A., 261 N.Y. 455, 185 N.E. 698.

Appellant States Marine contends that the shipowner cannot recover from the tug company for pilot negligence even though not bound by a pilotage clause because of the terms of the time charter. Appellant's contention that Victory Carriers, Inc. was precluded under the terms of the time charter from exacting damages from Red Stack, who was not a party to the time charter, states precisely the error which was corrected by the Court of Appeals for the Second Circuit in its second opinion in *The West Eldara*, (1939) 104 F.2d 670, cert. den. 308 U.S. 607, which also involved a charter whereby the charterer was to provide and pay for pilotage while the owner remains responsible for navigation. As the court stated at p. 671:

“Under this time charter which was not a demise, it is clear that the navigation of the vessel was the responsibility of the owner rather than that of the charterer. As between those two the acts or omissions of the tug boat captain while in charge of the vessel would be the acts or omissions of the owner even though he had been put in control by the charterer by virtue of its right to do so in accordance with the terms of clause 2 of the charter. *Munson S.S. Line v. Glasgow Navigation Co.*, 2 Cir., 235 F. 64; *The Volund*, 2 Cir., 181 F. 643.

“The error in the former opinion which led to an erroneous result lay in the extension of the above principle beyond the owner-charterer relationship so as to control in respect to liability as between the owner and third persons. *Bramble v. Culmer*, 4 Cir., 78 F. 497, on which especial reliance was placed, did not go so far nor did the other cases cited.

“On the contrary, in the absence of any special contract provisions like those in the pilotage clause which are not here binding upon the owner, one who is under contract to dock or undock a vessel is responsible as principal to the owner of the ship for the negligence of the agent whom the contractor places on the ship in charge of the operation. *The Edward G. Murray*, 2 Cir., 278 F. 895, 898; *Sturgis v. Boyer*, 24 How. 110, 16 L.Ed. 591; *The W. S. Holbrook*, D.C., 294 F. 908, affirmed 2 Cir., 294 F. 911. Such negligence is that of an independent contractor who has taken over the navigation of the ship. *The Dorset*, 4 Cir., 260 F. 32, 35; *Wilmington Ry. Bridge Co. v. Franco-Ottoman S. Co.*, 4 Cir., 259 F. 166.”

Certain recent cases which extended the protection of contract, viz., bill of lading, defenses to third parties, viz., stevedores, not a party to the contract, have just been soundly overruled by the U. S. Supreme Court by its affirm-

ance of the Court of Appeals for the Fourth Circuit in *Robert C. Herd & Company v. Krawill Machinery Corporation*, (1959) 359 U.S. 297.² Appellant States Marine in its application for an extension of time within which to file its opening brief, alleged that the decision of the Supreme Court in the said *Herd* case might be dispositive of this appeal, if a reversal. The Supreme Court affirmed. Appellant undaunted proceeds.

Appellant urges that the alleged protection of the time charter must extend to Red Stack to assure States Marine of the benefit of such protection because it may incur indemnity liability to Red Stack. Appellant conjectures that the Supreme Court in the *Herd* case would have so extended it for this reason (Br. pp. 23 and 24). This is highly unlikely since the *Herd* case cited and quoted with approval the previous decision in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575. This case held that Congress in the Suits in Admiralty Act had not extended any personal immunity to a private operator of a government ship and recognized, *a fortiori*, the "ancient principle" of agents' liability for negligence to third parties, saying:

"* * *. As stated in *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 258 U.S. 549, 567, 'An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts.' " (p. 580).

The court then went on to consider the effect of the argument that the government would be ultimately liable because it had an indemnity contract with its agent. The Supreme Court in the *Brady* case disposed of this argument, saying at page 583:

2. *Collins v. Panama R. Co.*, 197 F.2d 893 and other cases listed in footnote 8 of the opinion of the Supreme Court in *Herd*. These include the recent cases cited by appellant in its brief and on its motion for reconsideration in the court below (Tr. 36, 37).

“Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained.”

Appellant relies extensively on *Elder, Dempster & Co., Ltd. and others v. Paterson, Zochonis & Co. Ltd.* (1924) A.C. 522; (1924) 18 Ll.L.Rep. 319 (Br. pp. 19 and 20). The United States Supreme Court also considered this same argument based upon the same case in the *Herd* decision, and said at page 307 of this opinion, 359 U.S.:

“A careful reading of the several lengthy opinions of their lordships in that case (referring to *Elder, Dempster*) discloses that the question whether a provision in the bill of lading limiting the liability of the carrier likewise limits the liability of its negligent agent, though the agent is neither a party to nor an express beneficiary of the bill of lading, was not involved in or decided by that case.”

The Supreme Court in *Herd* expressly or impliedly disapproved the remaining cases relied upon by appellant States Marine, as it expressly held against appellant’s contention for vicarious immunity for agents.

About one week following the *Herd* decision, an English court reached the same result and similarly interpreted the *Elder, Dempster* case. This was the decision of Mr. Justice Diplock, in the High Court of Justice, Queen’s Bench Division (Commercial List), on April 28, 1959, in *Midland Silicones Limited v. Scruttons Limited* (not yet officially reported to our knowledge). Excerpts are quoted herewith to show the issue and holding:

“Mr. Justice Diplock: This is a test case brought to determine whether stevedores engaged by the ship-

owner (or carrier), who, in performance of their functions as stevedores, in loading, unloading or delivering cargo, tortiously damage that cargo, can, in an action for tort brought against them by the cargo-owner, rely upon any immunity from or limitation of liability contained in the contract of affreightment made between the cargo-owner and the shipowner (or carrier) by whom the stevedores are engaged.

“This question has been much debated in this country in the past 25 years, but has not yet been authoritatively decided here. In Australia it was authoritatively decided in the negative by a majority judgment of the High Court of Australia in 1956. (*Wilson v. Darling Island Stevedoring Company*, 1956 1 Lloyd’s List Reports, page 346). This overruled two earlier decisions by lower courts. In the United States, after considerable litigation, with varying results, it was authoritatively decided in the same sense as recently as last week by a unanimous judgment of the United States Supreme Court in *Robert C. Herd & Company v. Krawill Machinery Corporation*, the reference to which I cannot give.

“* * *

“I respectfully agree with Lords Justices Jenkins and Morris in *Adler v. Dickson* and with Mr. Justice Fullager and Mr. Justice Kitto in *Wilson v. Darling Island Stevedoring Company* and with the Supreme Court of the United States that the *Elder, Dempster* case is no authority for the principle of vicarious immunity from liability for torts, and that Lord Justice Scrutton incorrectly stated its effect.

“* * *

“I myself think that the present case is governed by the simple, fundamental, though no doubt old-fashioned, principles laid down by Lord Haldane and approved by the House of Lords in *Dunlop v. Selfridge*, and that the Defendants cannot limit their liability to the Plaintiffs in tort by relying upon a contract between the Plaintiffs and a third party to which they were not

parties, and for which they gave no consideration to the Plaintiffs. If in so deciding I am differing from the views expressed obiter by such distinguished lawyers as Lord Justice Scrutton and Lord Denning, I am fortified by the knowledge that a similar conclusion has been reached by the High Court of Australia and the Supreme Court of the United States for reasons much better and, in the latter case, succinctly expressed than my own.

“There will be Judgment for the Plaintiffs for £ 500 and something.”

Needless to say, the *Herd* case disposes of this phase of appellant's argument.³ Admittedly, the time charter is not expressly for the benefit of tug companies and, of course, the tug company is not a party to it. Appellant's argument that it should be construed as impliedly for the benefit of tug companies resulting in a vicarious immunity is completely spurious. Even if States Marine would have a defense if piloting themselves, the Supreme Court has ruled conclusively that this avails nothing to third parties they hire.

We believe the argument, and particularly the Restatement sections, are inappropriate to this case in any event.

3. The former decision of this court in *Twentieth Century Delivery Service v. St. Paul Fire & Marine Ins. Co.*, (9th Cir., 1957) 242 F.2d 292, which is cited by appellant and also referred to in footnote 8 by the Supreme Court in the *Herd* case, is not in point on the question of implied immunity since the contract involved in that case, which happened to be a tariff, expressly provided that it should “inure to the benefit of any other person, firm or corporation performing for the carrier pickup, delivery or other ground service in connection with the shipment.” 242 F.2d at p. 295. Vicarious immunity is particularly disfavored in Admiralty. See e.g. *The Childar* (9th Cir.) 83 F.2d 746, 1936 A.M.C. 724, holding that the shipowner's immunity from suit by seamen for personal injuries under the General Maritime Law does not protect a negligent pilot; and *International Milling Co. v. SS Perseus* (D.C. Mich.) 1958 A.M.C. 526, holding that the shipmaster may be liable for negligent navigation damaging cargo even though the shipowner is immune from such liability.

States Marine had no *privilege* to damage the vessel by the terms of the time charter, or otherwise. If States Marine had no duty vis-a-vis the owners to pilot carefully, this is because the performance of piloting is not its function⁴ under the time charter. This does not afford any basis for holding that Red Stack, an independent contractor⁵ who had undertaken the job of piloting, had no duty to pilot carefully.

II. ANSWER TO "ARGUMENT II" OF STATES MARINE

The Finding of the District Court That States Marine Was Not Authorized to and Did Not Bind Victory Carriers to the Pilotage Clause Is Clearly Correct.

Although on their motion for reconsideration in the District Court States Marine referred to the question of "agential immunity", discussed in the last section of this brief, as "the sole question presented by the present case" (Tr. 37), they now additionally assert that Victory Carriers, Inc. was bound by the pilotage clause. In fact, this is simply another attempt to bind a non-contracting party to a contract. The time charterer has no power to bind the shipowner to special release contracts with the tug company. Just as he cannot pass on the benefit of any time charter clauses to the tug company who is not a party to it, he cannot pass on the detriment of any special clauses of the towage or pilotage contract to the shipowner who is not a party to it.

4. Interestingly enough, in order to make their argument in this case States Marine has found it necessary to assert that the performance of piloting is its function (Br. pp. 8, 11, 19) which performance it allegedly delegates to Red Stack.

5. The authorities uniformly holding that when a tug company is hired to dock or undock the vessel, it does so as an independent contractor, are collected at footnote 5 of the opinion in the *Jules Fribourg*, *supra*.

As States Marine anticipated in its affidavit for extension of time, the Supreme Court decision in the *Herd* case is also determinative of this point.

The tug company is employed by the time charterer and by no one else, although the tug company thereupon handles the owner's property. Just as a carrier has no authority to bind the cargo-owner to special contracts with the stevedore he provides to handle the owner's cargo, a time charterer has no authority to bind the vessel owner to special contracts with the tug company he provides to handle the owner's vessel. We should point out further that the only conceivable consideration given for the release provisions of the pilotage clause is presumably a reduced rate. The benefit of any reduced rate inures to States Marine, who pays for the pilotage, not to Victory Carriers, Inc. The reasoning of *Herd* and the cases it relies on, as well as the more recent English case, is dispositive of both arguments of States Marine directed against Victory Carriers, Inc.

However, we should go on to point out that on this phase, States Marine seeks a reversal of findings of fact made against them by the trial judge.

The District Court expressly found that Victory Carriers, Inc. was not bound by the pilotage clause (Finding VII, Tr. 43). This finding was based on substantial evidence. States Marine did not call a single witness who participated in their transactions with owners or with Red Stack. In fact, they did not call any witnesses (Tr. 73). Victory Carriers, Inc. was never advised of nor notified of the pilotage clause which States Marine accepted (Tr. 65). There is no evidence that the master of the SS Lewis Emery, Jr. had ever seen any pilotage clause in San

Francisco. His testimony (which was not printed) is expressly to the contrary.

Customary use of pilotage clauses was not proved and is irrelevant in any event. At best, the evidence suggests that various forms of pilotage clauses are customary with Red Stack. In view of the broad trading limits in the charter, the owner does not know that the vessel will be sent to San Francisco at all. As previously discussed, there is no need or certainty that Red Stack be used even on a San Francisco call.

Appellant mentions that Victory Carriers, Inc. had through its own agents used Red Stack on occasions prior to this collision.⁶ This supports no inference that the owners authorized States Marine to bind them to a pilotage clause on this occasion. It was so held in *The West Eldara*, supra, where the evidence was that the owners had made prior agreements *on their own behalf* of which the pilotage clause was a part (see Opinion of the District Court reported in 1938 A.M.C. 282, at 285).

In its Finding No. VII (Tr. 43) the District Court found on substantial evidence that "Victory Carriers, Inc. took no part in requesting the towage service. The request was made solely by and on behalf of States Marine, and all charges for tug and pilot service involved in the operation were billed to and paid by States Marine. In dealing with Shipowners & Merchants (Red Stack), States Marine was not authorized to, and did not bind Victory Carriers to the terms of the pilotage clause and Victory Carriers was not contractually bound thereby." This finding is not only not "clearly erroneous", it is eminently correct. It is

6. These were movements for the account of the Department of the Navy, Military Sea Transportation Service. The Red Stack bills were paid by the vessel's agents for the account of Military Sea Transportation Service (Tr. 79).

identical to the holding in *The West Eldara*, 104 F.2d 670;⁷ *The Niels R. Finsen*, (S.D.N.Y., 1931) 52 F.2d 795, and the *Jules Fribourg*, supra. The contention on page 31 of appellant's brief that such holdings were not necessary to the decision in the particular cases is frivolous. Being bound by the pilotage clause will entirely defeat recovery for pilot negligence. In all these cases, the shipowner was granted recovery for pilot negligence. The most that can be said on behalf of appellant is that in the *Jules Fribourg*, supra, the holding that the time charterer did not bind the shipowner to the pilotage clause was an alternative ground for the decision.

"For it appears that under the circumstances of this case, the pilotage clause is a nullity for two reasons.

"The first is that the owner of the *Jules Fribourg* is not contractually bound by the clause."

People of California v. S.S. Jules Fribourg, 140 F. Supp. 333; 1956 A.M.C. 939, 946.

7. It should be noted that this was the last of three separate hearings in *The West Eldara* case resulting in three different decrees and the courts never once varied in their ruling on the pilotage clause. All three decisions stated expressly that the charterer was without authority to bind the owner to the clause. We urge the court to examine all three decisions. The District Court opinion is reported at 1938 A.M.C. 282; the first decision of the Court of Appeals at 101 F.2d 45.

Appellant's opening brief (pp. 28 and 29) refers to the citation in one part of the last opinion in *The West Eldara* of *The Kate* (1896) 164 U.S. 458 in support of the court's conclusion that the pilotage clause was not binding on the owner. The brief implies that *The Kate* was overruled by *Dampskibsselskabet v. Oil Co.*, 310 U.S. 268. However, as the brief is careful to point out (albeit not too clearly) the result in *The Kate* regarding creation of maritime liens (not involved in this case) was changed by the Maritime Lien Act of 1910, 36 Stat. 604 (erroneously referred to in appellant's brief as the Act of 1920). The law of *The Kate*, absent a specific applicable statute, was not disturbed. *Dampskibsselskabet v. Oil Co.* did not deal with *in personam* liability in any event. We should add that the result in *Dampskibsselskabet v. Oil Co.* would not obtain under the Lewis Emery, Jr. charter since Clause 18 prohibits the creation of liens by a charterer in the same terms as the charter in *U. S. v. Carver*, 260 U.S. 482, discussed in *Dampskibsselskabet v. Oil Co.*, 310 U.S. at page 275.

III. ANSWER TO ARGUMENTS III, IV AND V OF STATES MARINE

These sections of the brief contain arguments which do not adversely affect Victory Carriers, Inc.

CONCLUSION

The interlocutory decree of the District Court granting libelant full recovery against Red Stack should be affirmed.

Respectfully submitted,

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No. 16,104

United States Court of Appeals
For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
a corporation, *Appellant*,

vs.

VICTORY CARRIERS, INC., a corporation, and
SHIPOWNERS & MERCHANTS TOWBOAT CO.,
LTD., a corporation, Claimant of the
Tug Sea Scout, *Appellees*,

and

SHIPOWNERS & MERCHANTS TOWBOAT CO.,
LTD., *Appellant*,

vs.

VICTORY CARRIERS, INC., a corporation,
Appellee.

BRIEF FOR APPELLEE

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PAUL P. O'BRIEN, C.

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No. 16,104

United States Court of Appeals For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
a corporation, *Appellant*,
vs.

VICTORY CARRIERS, INC., a corporation, and
SHIPOWNERS & MERCHANTS TOWBOAT CO.,
LTD., a corporation, Claimant of the
Tug Sea Scout, *Appellees*,
and

SHIPOWNERS & MERCHANTS TOWBOAT CO.,
LTD., *Appellant*,
vs.

VICTORY CARRIERS, INC., a corporation,
Appellee.

BRIEF FOR APPELLEE

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.

JURISDICTION.

Appellee Shipowners & Merchants Towboat Co., Ltd. (hereinafter called "Shipowners & Merchants") approves the statement of jurisdiction presented by appellant States Marine Corporation of Delaware (hereinafter called "States Marine".)

STATEMENT OF THE CASE.

Shipowners & Merchants does not controvert the statement of facts set forth on pages 3 to 7 of States Marine's brief. Its statement of the issues, however, (pp. 8 and 9) is misleading and must be clarified:

1. Contrary to States Marine's statement (p. 8), there is no issue in this case of whether it or any charterer "can be subjected to liability for collision damage." States Marine was neither sued nor held liable for collision damage. Its liability arises from an express contract warranting its authority to act and agreeing to furnish indemnity for all loss and expense resulting from a breach of that warranty. The issues on this appeal concern that contract—its existence, validity and effect, together with the issue of whether or not the warranty was breached.

2. The District Court found (Finding V, Tr. 41) that States Marine was bound by the 1956 form of pilotage clause. The issue here is not whether Shipowners & Merchants has "carried its burden of proving" that contract (States Marine's brief, p. 8) but whether Judge Goodman's finding to that effect was clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 99 L. ed. 20 (1954.)

This appellee agrees with States Marine's statement of the legal issues designated as points (2) (a) and (b) on page 9 of its brief.

ARGUMENT.

Shipowners & Merchants has for years operated under a "pilotage clause" by which its tug masters are deemed the servants of the shipowners whose vessels they pilot during docking and undocking maneuvers. Such clauses are used by other tug companies in other ports, and have been applied repeatedly in cases arising before and since their validity was finally upheld in *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 77 L. ed. 311 (1932). The effect, when the shipowner has agreed to the clause, is to prevent his recovering from the tug company for damage to the vessel caused by the pilot's fault.

When the shipowner is not a party to the contract, however, as in a case where the tug and pilot service is requested by a charterer, it has been held that the pilotage clause in its traditional form does not protect the tug company. Thus, in *The Jules Fribourg*, 140 F. Supp. 333 (N.D.Cal. 1956), which involved the same tug company and the same charterer as are here on this appeal, it was held that States Marine was not authorized to bind the owner to the clause, and that no warranty of such authority could be implied from the circumstances of the case. The result was that the owner recovered his hull damage from Shipowners & Merchants, while States Marine escaped liability.

Within six weeks of the *Fribourg* decision, Shipowners & Merchants circularized among its customers an amended pilotage clause, including as the major modification a new paragraph by which charterers and other non-owners expressly warranted their authority to bind owners to the clause and expressly agreed to indemnify Shipowners & Merchants against loss, damage or expense suffered in

consequence of a breach of that warranty. The new clause, obviously designed to protect Shipowners & Merchants in any future *Fribourg* situation, was received without protest by States Marine, which thereafter continued to use the services of Shipowners & Merchants. Seven and one-half months later the collision occurred which gave rise to this case. Victory Carriers sued Shipowners & Merchants, who impleaded States Marine under the pilotage clause.

After following the *Fribourg* decision and allowing the owner to recover from Shipowners & Merchants, Judge Goodman recognized the clear intent of the new clause and, finding as a fact that it had been communicated to and accepted by States Marine as part of the contract, rendered a decree for indemnity in accordance with its terms. The collision had resulted from mutual faults by the pilot and the tug. Had States Marine been authorized to bind Victory Carriers to the clause, the effect would have been to impute the pilot's negligence to the latter, thus reducing its recovery to half damages under the usual rule of mutual fault collisions. Accordingly, Judge Goodman found that States Marine's breach had damaged Shipowners & Merchants to the extent of one-half the total damages, and awarded indemnity to cover that sum.

On this appeal, States Marine takes issue with virtually all aspects of the decision below except the finding of mutual fault. Its main attack, to which the first and major portion of its brief is devoted, is upon the District Court's finding that Victory Carriers was not bound by the pilotage clause and was entitled to recover from Shipowners & Merchants for damage caused by pilot error.

For the reasons expressed in its opening brief as appellant, Shipowners & Merchants takes no position on that issue and will not reply to the argument thereon.

States Marine's argument against the indemnity decree, which it concedes to be of secondary importance, appears at pages 33 to 42 of its brief. It consists of a casual attempt to upset a finding of fact, vague insinuations of "monopoly," implications of doubt as to the validity of the pilotage clause, and an attempt to cloud the issues by reference to stevedore cases having nothing to do with either pilotage or collision law. Such tactics cannot obscure but rather serve to emphasize the desperate position in which States Marine finds itself, faced with:

1. the necessity of upsetting a finding after failing to produce the only witnesses whose testimony could possibly have supported a contrary finding,

2. the Supreme Court's approval of the pilotage clause, first expressed in 1932 and reaffirmed in 1955, and

3. a complete lack of pilotage or collision cases supporting its theories of why Shipowners & Merchants should be denied the protection of the clause in this case.

I.

THE FINDING THAT STATES MARINE ACCEPTED AND BECAME BOUND BY THE 1956 PILOTAGE CLAUSE WAS NOT CLEARLY ERRONEOUS.

Leo J. Collar, of the office staff of Shipowners & Merchants, testified (Tr. 60-64) that on May 4, 1956, he sent two copies of a letter (Respondent's Ex. C) together with several copies of a printed form of schedule or tariff

(Respondent's Ex. D) to two named individuals of States Marine, and that States Marine continued to hire Ship-owners & Merchants tugs frequently thereafter during the eight months up to the date of the accident, without answering the communication of May 4, 1956. Proctor for States Marine did not cross-examine Collar as to such testimony, and produced no evidence to controvert it. In view of such clear proof of receipt and failure to protest, it may be fairly assumed that States Marine acquiesced in the terms set forth in the letter and enclosures of May 4, 1956, which clearly embodied the indemnity agreement here in issue.

The following authorities support this assumption:

The Margaret A. Moran, 57 F.2d 143 (2 Cir. 1932):

“This towing schedule, containing the pilotage clause, sufficiently apprised the appellee that the service was to be rendered on these terms. No other terms having been suggested by the appellee, we must assume that they accepted the terms contained in the schedule.” (p. 144.)

Graves v. Davis, 1923 A.M.C. 490, 235 N.Y. 315, 139 N.E. 280 (N.Y.Ct.App.):

“When the defendant gave notice on what terms it would furnish tug service, the charterer actually accepted such terms and entered into a special contract incorporating them when it ordered tow service without protest.” (1923 A.M.C. at p. 492.)

Hand & Johnson Tug Line v. Canada S.S. Lines, 281 Fed. 779 (6 Cir. 1922):

“Nor is any express assent by the appellee necessary to make a binding contract. If the tariff had

been received, appellant had a right to assume that a request for towing was pursuant to the offer which had been made, and hence upon all conditions stated, and appellee may not deny that the conditions attached.” (p. 783.)

For all practical purposes, the sufficiency of the transmission of the contract terms, and the acquiescence thereto, has been admitted in the following colloquy between the trial court and proctor for States Marine, (Tr. 84):

“The Court. Well, I think I would have to hold, from the state of the record, that this particular provision was called to the attention of your client as being a condition under which the pilots were being furnished. I mean, there is no contrary testimony, nothing to indicate it otherwise.

Mr. Tetreault. No; we concede we received the letter.”

States Marine sought in the trial court, and seeks again here, to qualify this admission and to cloud the proof of a specific contract condition by reference to older forms of the pilotage clause printed on billheads or letterheads passing between the parties. This is merely an attempt to create an illusion, unsupported by proof, that officers of States Marine were misled into assuming that services were to be provided under the older clause rather than the newer form specifically called to their attention by the letter and enclosures of May 4, 1956. (Respondent's Ex. C and Ex. D.)

If these people were confused or misled, why didn't they come forward and say so? Not a single witness was

produced by States Marine to say that he thought he was operating under the older clause, or that he didn't know which clause applied. It has been proved and admitted that the new clause was properly called to the attention of States Marine as a condition under which pilots were furnished, and, in the words of Judge Goodman, there is no contrary testimony.

The reason for such reticence is obvious. The decision in *The Jules Fribourg*, 140 F. Supp. 333, in which States Marine faced the problem of possible indemnity obligation for pilot error, was handed down March 29, 1956. Only a few weeks later, on May 4, 1956, a new form of tariff and a specific letter were sent to Mr. de la Pena and to Captain Griffith of States Marine (Collar; Tr. 60) containing the text of a new pilotage clause which was patently designed to avoid the type of liability imposed upon the tug owner by the *Fribourg* decision. Mr. de la Pena and Captain Griffith must have been keenly aware of the issues raised by the new clause. It is inconceivable that they could testify under oath that they did not understand the new clause, or had not read it, or were misled by some other clause appearing on a billhead. For this reason, they did not appear at all, and their eloquent silence, coupled with Collar's testimony, amply supports the finding of the trial court that States Marine accepted and became bound by the 1956 pilotage clause. As Judge Goodman said, in answer to States Marine's argument based on the use of the old bill forms and letterheads:

“I don't think very much of the logic of that argument. I don't blame you for making it, but we have to use our common sense, of course, in apprais-

ing the conduct of the parties. It is very obvious this is the clause by virtue of the decision that had been rendered in the Fribourg case, and both parties having been involved in it, this was the clause they now wanted to use and the fact that they used some old documents in which to convey that information doesn't seem to me to be a reasonable basis of construction what the parties intended to do." (Tr. 88.)

The "monopoly position" of Shipowners & Merchants, to which States Marine makes casual reference in its brief (pp. 9, 37) is not established by the record. With a pilotage clause, as with any contract, the burden of establishing that it is against public policy is upon the party who asserts that fact. *National Distillers Prod. Corp. v. Boston Tow Boat Co.*, 134 F. Supp. 194 (D.Mass. 1955). Yet States Marine called no witnesses, and bases its monopoly argument entirely on the testimony of Mr. Collar. (Tr. 70-71.) That reliance is mystifying, as Mr. Collar made repeated reference to other tug companies and other pilots, and to their use by States Marine.

Also unwarranted is the implication in States Marine's brief (pp. 36-37) that the Supreme Court, in the 1955 towage cases (*Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 99 L. ed. 911; *Boston Metals Co. v. S.S. Winding Gulf*, 349 U.S. 122, 99 L. ed. 933; *United States v. Nielson*, 349 U.S. 129, 99 L. ed. 939) has weakened or qualified its 1932 decision upholding the validity of the pilotage clause in a docking or undocking situation. (*Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 77 L. ed. 311.) In fact the Court reaffirmed its earlier holding in the course of the *Bisso* opinion:

“It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company’s vessel on that vessel’s own power. That was the Sun Oil Case. It is quite a different thing, however, to permit a towing company to exempt itself by contract from all liability for its own employees’ negligent towage of a vessel. Thus, holding the pilotage contract valid in the Sun Oil Case in no way conflicts with the rule against permitting towers by contract wholly to escape liability for their own negligent towing.” (349 U.S. at p. 94, 99 L. ed. at p. 919.)

II.

HAD VICTORY CARRIERS BEEN BOUND BY THE PILOTAGE CLAUSE IT WOULD HAVE BEEN RESTRICTED TO A RECOVERY OF HALF DAMAGES.

In a mutual fault collision each vessel recovers one-half her damages from the other. *The North Star*, 106 U.S. 17, 27 L. ed. 91 (1882). Had the pilotage clause been brought home to Victory Carriers, the effect would have been to impute the pilot’s fault to the Emery and her owners, and to require an adjustment of the collision claim on a mutual fault basis.

It is important to bear in mind that we are dealing here with a case of damage *to the assisted vessel*, not to a tug or a third vessel. The effect of a pilotage clause on the owner’s right to recover in such a case has never been doubted since *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 77 L. ed. 311 (1932). That decision gives full effect to the language of the clause insofar as it makes the pilot the servant of the vessel owner and thereby prevents the

latter from recovering damages based on pilot error. To the same effect are

The Margaret A. Moran, 57 F. 2d 143 (2 Cir. 1932);
National Distillers Prod. Corp. v. Boston Tow Boat Co., 134 F. Supp. 194 (D. Mass. 1955);
Hagood, 1925 A.M.C. 1646 (S.D.N.Y. 1925).

If the damage results solely from pilot error, as in the above cases, there can be no recovery from the towing company. If the damage results from mutual faults by the pilot and the tug, as in the case at bar, the only logical result is to reduce the owner's recovery to one-half, since that would be the result were his own employees in charge of the ship:

Great Lakes Towing Co. v. American S.S. Co., 165 F. 2d 368 (6 Cir. 1948);
The Teaser, 246 Fed. 219 (3 Cir. 1917);
U. S. v. Holland, 151 F. Supp. 772 (D. Md. 1957);
North Sea-Texas, 1928 A.M.C. 758 (W.D.N.Y. 1927);
The Adriatic, 183 Fed. 867 (E.D.Pa. 1910).

The effect of the clause is not to "absolve" the pilot of negligence, as stated by States Marine? (p. 40.) His negligence remains in the case, but the ultimate responsibility therefor, as between parties to the clause, is shifted to the owner to the extent specified in the contract.

United States v. Nielson, 349 U.S. 129, 99 L. ed. 939 (1955) is in no way contrary to the above rule. The Supreme Court there denied the tug company the right to recover for damage *to its own tug*, caused by pilot error, simply because the contractual language was not broad enough to grant such a right. (See the analysis of this holding in *City of Long Beach v. American President*

Lines, 223 F. 2d 853, 858 (9 Cir. 1955).) The *Nielson* decision, being purely factual, can hardly control the present case which involves a different form of pilotage clause and a claim *by* the shipowner instead of *against* it. Here, the clause expressly provides that the vessel and her owners “will assume all liability” for damage caused by pilot error and that the tug owner bears no responsibility therefor. Clearer language is difficult to imagine, and it is worthy of note that no claim is made by States Marine that the result below is not in accord with the wording of the contract.

The Chattahoochee, 173 U.S. 540, 43 L. ed. 901 (1899), cited by States Marine at page 40 of its brief, held that innocent owners of cargo lost in a mutual fault collision could recover damages in full from the colliding vessel, even though they were prevented by statute from proceeding against the carrying ship. The rule is consistent with the ordinary obligations of a joint tortfeasor to an innocent third party. Its relevance to the present case is lacking, however, as the key to the *Chattahoochee* result is the complete freedom from fault, imputed or otherwise, on the part of the cargo claimants. Victory Carriers could not claim such innocence had it been bound by the pilotage clause, for it would thereby have agreed to assume all liability for pilot negligence.

The interjection of the stevedore indemnity cases (*Weyerhaeuser*, *Ryan*, *Mowinckels* and *Crumady*) at page 41 of States Marine’s brief is likewise irrelevant and serves merely to cloud the real issues. Those cases hold that a stevedore, whose negligence has created a dangerous condition causing personal injuries for which a vessel

owner is held liable, is obligated to indemnify the owner under an express or implied warranty of workmanlike service in the stevedoring contract. Without citation of authority, States Marine seeks to extend the stevedore rule to cover this collision case. In so doing, it conveniently ignores the multitude of cases, such as those cited at page 11 above, giving tug companies the benefit of the divided damage rule in mutual fault situations. Adoption of the rule for which States Marine contends would require the overruling or disapproval of all such cases, since each involved an agreement for towage or assisting service, affording the same basis for an implied warranty as exists in the case at bar. There are compelling distinctions between the stevedore cases and the present collision case which prevent the application of the indemnity theory:

1. The stevedore indemnity cases all involve suits *on the contract*, not in tort. That approach was found necessary to avoid the rule of *Halcyon Lines v. Haenn Ship C. & R. Corp.*, 342 U.S. 282, 96 L. ed. 318 (1952) wherein the Supreme Court held that an action for contribution from the negligent stevedore on a tort theory would not lie. By no stretch of imagination can the libel herein (Tr. 3) be described as sounding in contract. No mention is made of any agreement or warranty by Shipowners & Merchants. Victory Carriers' cause of action was pleaded and proved purely in tort, as it had to be. (See *Stevens v. The White City*, 285 U.S. 195, 76 L. ed. 699 (1932).) The distinction is critical. In the *Ryan* case the Supreme Court emphasized that the stevedore's obligation is determined by "the precise ground of the ship-

owner's action." Pointing out that the action was on the agreement, the Court said that "consequently, the considerations which led to the decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 96 L. ed. 318, 72 S. Ct. 277, are not applicable." (*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 132-133, 100 L. ed. 133, 141 (1956).)

2. All of the stevedore cases cited by States Marine are *non-collision* cases. The indemnity rule is relatively new, and developed, as explained above, from the decision in the *Halcyon* case refusing to extend the divided damage rule to a non-collision case. It is clear from the *Halcyon* opinion, however, that the collision rule is to be unchanged: "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each. . . . This maritime rule is of ancient origin and has been applied in many cases. . . ." (*Halcyon Lines v. Haenn Ship C. & R. Corp.*, 342 U.S. 282, 284, 96 L. ed. 318, 319 (1952).) States Marine cites no authority to indicate that Victory Carriers would have been able to avoid this time-honored rule had it been bound by the pilotage clause.

3. Were Victory Carriers bound by the clause, its assumption of liability for the pilot's fault would bar any claim for full recovery from Shipowners & Merchants even if the stevedore cases were applicable. States Marine's argument assumes an *implied* promise of indemnity by the tug company. It is settled that the shipowner has no cause of action for implied indemnity in a

joint fault case. *Amerocean Steamship Company v. Copp*, 245 F. 2d 291 (9 Cir. 1957).

4. In *Ryan* and the other stevedore cases it was permissible for the courts to find implied indemnity agreements benefiting the shipowners since the actual contracts did not purport to cover the point one way or the other. Assuming the pilotage clause to be binding on Victory Carriers, the situation would not be at all parallel. In that event the implication of an indemnity obligation on the part of Shipowners & Merchants would not only be unwarranted by the contract, but would be contrary to its express terms, since under the clause the shipowner expressly assumes liability for pilot error and agrees to indemnify the tug company.

III.

THE TUG'S FAULT DOES NOT BAR SHIPOWNERS & MERCHANTS FROM ENFORCING THE EXPRESS INDEMNITY OBLIGATION OF STATES MARINE UNDER THE PILOTAGE CLAUSE.

States Marine expressly warranted its authority to bind Victory Carriers to the pilotage clause and expressly agreed to indemnify Shipowners & Merchants against all loss, damage and/or expense suffered or incurred in consequence of its lack of such authority. (Finding V, Tr. 41-43.) In consequence of States Marine's breach of the foregoing warranty (Finding VII, Tr. 43) Shipowners & Merchants was damaged to the extent of one-half the amount of its liability to Victory Carriers (Finding XIII,

Tr. 45). Applying the clear terms of the indemnity agreement, the District Court held States Marine liable over to Shipowners & Merchants for such one-half. (Finding XIII, Tr. 45; Conclusion III, Tr. 46; Interlocutory Decree, Tr. 47.)

States Marine now claims (Brief, p. 41) that the independent negligence of the tug somehow provides a defense by which States Marine can escape the express obligations it assumed in the contract. Once again its argument is based entirely on a non-collision stevedore case (*Amerocean Steamship Company v. Copp*, 245 F. 2d 291) which is readily distinguishable:

1. The discussion in the *Copp* opinion makes it clear that this Court was there dealing with an *implied* indemnity obligation such as was held to exist in the *Ryan* case. Since the accident resulted from active and concurrent negligence by both the shipowner and stevedore, the case was governed by the *Halcyon* decision and held that no implied indemnity obligation existed. Even in the stevedore cases (assuming they had any relevance here) the situation is far different when an *express* indemnity agreement is involved. In such a case the stevedore is held to his indemnity obligation regardless of the shipowner's fault. *A/S J. Ludwig Mowinckels R. v. Commercial Steve. Co.*, 256 F. 2d 227 (2 Cir. 1958).

2. The *Copp* decision itself expressly limits its application to *non-collision* cases. It follows *Halcyon* by denying recovery over in a joint fault situation, in accordance with well established common law and admiralty doctrine, but points out that "an apparent exception is division of damage in ship collision cases." (245 F. 2d at p. 294.)

3. The *Copp* libelant was seeking *complete* indemnity for a loss to which his own negligence had contributed. Relief was denied since it would have allowed him to take advantage of his own fault. (See 245 F. 2d at p. 294.) The situation is different here. Shipowners & Merchants does not seek to avoid its rightful liability based on the fault of the tug, a liability which is equal to one half the total damages. It merely seeks indemnification to cover the remaining half, for which its liability exists solely by virtue of States Marine's breach of warranty. States Marine offers neither argument nor authority that such apportionment of the ultimate liability is at all inequitable. In fact, the partial indemnity sought by Shipowners & Merchants is nothing new, but has been granted before in a pilotage clause situation. In *Gypsum Queen-Peerless*, 1953 A.M.C. 2071 (E.D. Va. 1953), a ship collided with the pier due to faults by the tug and the docking pilot. The tug company was liable in full to the owner of the pier (on whom the pilotage clause was not binding) but recovered one-half from the shipowner as indemnity under the clause. The basis for indemnity is even clearer in the present case, since the 1956 pilotage clause includes an *express* indemnity agreement which was not present in the *Gypsum Queen* clause.

CONCLUSION.

The decree against States Marine followed a factual finding, based upon substantial evidence, that the services of the pilot were ordered pursuant to the 1956 pilotage clause. That clause is not ambiguous. It clearly defines the responsibilities of a charterer, which previously had been trusted to implication. Federal courts, including the Supreme Court, have consistently recognized the freedom of parties contracting for pilot service to agree beforehand on the distribution of contingent liabilities inherent in a docking or undocking situation. The decree below, in applying the pilotage clause as written, is but another recognition of that freedom of contract, and is consistent with prior authority. It should be affirmed.

Dated, San Francisco, California,

June 15, 1959.

Respectfully submitted,

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No. 16,104

United States Court of Appeals
For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
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Tug Sea Scout, *Appellees*,
and

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
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vs.

VICTORY CARRIERS, INC., a corporation,
Appellee.

REPLY BRIEF OF APPELLANT
STATES MARINE CORPORATION OF DELAWARE.

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**REPLY BRIEF OF APPELLANT
STATES MARINE CORPORATION OF DELAWARE.**

I

REPLY TO VICTORY CARRIERS' BRIEF

Red Stack Is Not Liable to Victory Carriers for Pilot Negligence

*"The time has come," the Walrus said,
 "To talk of many things:
 "Of shoes — and ships — and sealing wax
 "Of cabbages — and kings —
 "And why the sea is boiling hot —
 "And whether pigs have wings."*

Through the Looking-Glass, Lewis Carroll

But that is another story.

Plain Tales, R. Kipling

Victory Carriers' brief discusses many things skillfully but with greater skill avoids mentioning Clause 26 of the charter party, "Owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account." Victory Carriers' silence does not accomplish its wishful purpose of striking the clause from evidence. Such silence does, more eloquently than an express admission, demonstrate that Victory Carriers' position cannot survive consideration of the plain language of its contractual undertaking.

Victory Carriers concedes (V.C. Br. p. 12 n.3) that the decision of the United States Supreme Court in the *Herd* case (1959) 359 U.S. 297 does not impugn the validity of the principle of cases such as this Court's decision in *Twentieth Century Delivery Service v. St. Paul* (9 Cir. 1957) 242 F. 2d 292 where the prime contract contemplates that its benefit should extend to subcontractors appointed to assist in performing the prime contract.

The broad undertaking of Victory Carriers by its contract in the present case, "to remain responsible for navigation . . . same as when trading for its own account" clearly states a more extensive concession by Victory Carriers than a bare release of liability of States Marine. In the context of a time charter operation it can be read only as meaning precisely what it says, i.e., that Victory Carriers remains responsible for navigation vis-a-vis States Marine and any subcontractors provided by States Marine to assist Victory Carriers in performing its function of navigation—to the same extent, no greater and no less, that would be the case if Victory Carriers were "trading for its own account."

In its Statement of the Case (Br. 5), although going far beyond the record, Victory Carriers argues that it was not necessary for States Marine to order a Red Stack undocking service because there are many independent pilots unrelated to tugboat companies, apparently contending, for the first time, that "if trading for its own account" it would not necessarily have employed a Red Stack undocking service. Let us examine the contention. If States Marine had hired an independent pilot neither States Marine nor the tugboat company would have been liable to Victory Carriers for his negligence. At most Victory Carriers would have had its recourse against the individual pilot, which is the full extent of the recourse it would have had "if trading for its own account,"—a recourse of which it did not avail itself in the present case.

If Victory Carriers had been "trading for its own account" it would necessarily have hired an independent pilot (for whose negligence there would have been no

corporation responsible) or, as it did, (Tr. 79) hire Red Stack in which case the matter of pilot negligence would have been subject to a Red Stack pilotage clause. Victory Carriers hopes in the present case to achieve a windfall recoupment for pilot negligence over and beyond anything that would be available to it if it were "trading for its own account." In so doing it disregards its clear responsibility under its charter party contract—whether the contract be read as contemplating the inclusion of Red Stack, or as authorizing States Marine to contract with Red Stack on behalf of Victory Carriers within the scope of its terms. We submit that the contract does both.

Victory Carriers insinuates (Br. 13) that the assertion of States Marine that it was authorized to and did bind Victory Carriers to a Red Stack pilotage clause is something which was not urged by States Marine in the trial court. States Marine makes no contention on this appeal which it did not make and brief before the trial court. Victory Carriers' quotation (Tr. 37), when read in context, is clearly a statement of States Marine's position, there and here, that the conceded immunity of the time charterer for pilot negligence relates only to vicarious immunity, and that the question of individual responsibility for personal negligence is not presented by the present case. The falsity of the insinuation that States Marine is newly contending that it had agential authority to bind Victory Carriers to a pilotage clause is disclosed by the same document, from which Victory Carriers quotes, i.e., Motion for Reconsideration (Tr. 38), in which States Marine urged "Victory Carriers, Inc. was bound to the provisions of said pilotage clause."

Victory Carriers urges (Br. 14), we know not why, that the liability limitations of the Red Stack pilotage clause must be supported by the consideration of a reduction in Red Stack's rates. On the contrary, the attempted imposition of a pilotage clause by Red Stack is without fear or favor and has been on a take it or leave it basis to all comers (Tr. 68).

On page 13 of its brief Victory Carriers states:

“If States Marine had no duty vis-a-vis the owners to pilot carefully, this is because the performance of piloting is not its function under the time charter. This does not afford any basis for holding that Red Stack, an independent contractor who had undertaken the job of piloting, had no duty to pilot carefully.”

This passage succinctly states the dilemma of Victory Carriers' position. On the one hand Victory Carriers professes, albeit with tongue in cheek, that it was an agnostic stranger to Red Stack and to any contractual arrangements imposed by Red Stack. On the other hand it urges, as it must, that Red Stack having undertaken by contract with States Marine to undock Victory Carriers' ship, was bound to perform the piloting portion of the undocking job in a careful manner. Victory Carriers looks to the undocking contract to assert a claim against Red Stack (after all, it is damage resulting from the negligent navigation of its own manned and powered vessel for which Victory Carriers seeks recompense, Finding IX, Tr. 44), but in so doing conveniently blinds itself to the provisions of that contract.

II

REPLY TO RED STACK'S BRIEF

Red Stack Is Liable to Victory Carriers for Full Damages for Tug Negligence

"I like the Walrus best," said Alice: "Because he was a little sorry for the poor oysters."

"He ate more than the Carpenter, though," said Tweedledee.

"You see he held his handkerchief in front, so that the Carpenter couldn't count how many he took; contrariwise."

Through the Looking-Glass, Lewis Carroll

As at the trial, States Marine is on this appeal the man in the middle of a cross-ruff. The American concept of litigation as an adversary proceeding meets its most difficult test where, as here, nominally adversary parties fail to litigate as adversaries. The briefs of Victory Carriers and Red Stack continue the concordat commenced in the trial court under which Red Stack concedes liability to Victory Carriers (Rep. Tr. p. 134, not printed) for full damages (in the trial court such concession was premised on pilot negligence although Victory Carriers' libel was premised on tug negligence) and Victory Carriers assists Red Stack in its efforts to recover indemnity from States Marine.

Only two portions of Red Stack's brief require reply.

The first is that portion (Br. 7-8) where Red Stack hopefully suggests that as a matter of burden of proof it was the duty of States Marine to come forward to testify that it was misled by the Red Stack letter of May 4, 1956

in view of the inconsistent invoice contract clauses received by it during the following nine months up to the collision. Any such testimony as to subjective facts would have been inadmissible and excluded as well as unnecessary surplusage. The facts which make a contract are objective facts and the burden of proving such facts is on the party claiming the benefit of the contract. Red Stack clearly failed in proving that the letter of May 4, 1956 was the contract (rather than Imp. Rep. Ex. A, Tr. 66a). It was not States Marine's burden to dignify Red Stack's contention by producing testimony where the objective fact of Red Stack's consistent invoicing practice, which established its contract in *The Jules Fribourg* (N.D. Cal. 1956) 140 F. Supp. 333, was clear and admitted.

The second point asserted by Red Stack is its contention (Br. 12-15) that the stevedoring indemnity cases are inapplicable because they concern implied contracts of indemnity while in the present case the pilotage clause was written. Red Stack appears to urge, erroneously but by way of diversion, that States Marine is suggesting that Victory Carriers' right to full indemnity arose from an implied contract by Red Stack to indemnify with respect to pilot's negligence. On the contrary, States Marine's suggestion is that Victory Carriers, even if bound by a pilotage clause, was entitled to full damages from Red Stack by reason of Red Stack's implied contractual undertaking to indemnify fully for damages resulting from Red Stack's failure to operate its tug SEA SCOUT in a careful and workmanlike manner. Red Stack contracted with States Marine, for the benefit of Victory Carriers, that it would operate its tug carefully. It

breached this contract and is liable for the full collision damages contributed to by that breach. Red Stack fails to propose any basis for distinguishing in principle, with respect to an implied obligation to indemnify for failure to perform work properly, the situation of the stevedoring contractor who has been hired to load a vessel from the situation of the tug SEA SCOUT which was hired to assist in undocking a vessel. None of the collision cases upon which Red Stack relies in its attack on the principle of *Ryan v. Pan-Atlantic* (1956) 350 U.S. 124 discuss the effect of the contractual relationship between the vessel and tug. The decision of the Eastern District of Virginia (1953) in the *Gypsum Queen*, 1953 AMC 2071, not officially reported, indicates a result which is hypothetically attractive to Red Stack. We do not know the arguments presented to the court in the *Gypsum Queen* case. We do know that it was decided before *Ryan v. Pan-Atlantic* (1956) 350 U.S. 124 and before *United States v. Neilson (Christopher Gale/Dauntless)* (1955) 349 U.S. 129 and that the result in the *Gypsum Queen* case is inconsistent with the result in either of the two cases last cited.

Red Stack in urging that Victory Carriers would have been limited to half damages if bound by a pilotage clause attempts to distinguish the result in *The Chattahoochee* (1899) 173 U.S. 540 on the ground that in the *Chattahoochee* case cargo was innocent without any blame imputed to it by contract or otherwise, while in the present case it is asserted that blame would have been imputed to Victory Carriers if Victory Carriers had been bound by a pilotage clause. In Finding XII (Tr. 45) (not attacked) the Trial Court found Victory Carriers wholly without

blame in the navigational facts leading up to the collision. The U. S. Supreme Court in *United States v. Atlantic Mutual Ins. Co. (Esso Belgium/Nathaniel Bacon)* (1952) 343 U.S. 236 held invalid as against public policy a carrier's attempt by contract to divest cargo of a portion of the recovery to which it was entitled under the *Chattahoochee* against the non-carrying vessel. In the *Esso Belgium* case the principle of full recovery under the *Chattahoochee* was held to prevail against the attempt of the carrier to defeat it through use of the both-to-blame collision clause. We do not urge that the holding in the *Esso Belgium* is necessarily of itself controlling in the present case. We do urge that the doctrines of public policy relating to common carriers which dictated the result in that case are equally applicable to and controlling in the present situation which involves an attempt by Red Stack to avoid a portion of its liability for damages resulting from negligent operation of its tug. It is established public policy that a tug may not by contract exempt itself from liability for negligent injury to its tow. *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85.

III

STATES MARINE WAS AUTHORIZED TO BIND VICTORY CARRIERS TO A PILOTAGE CLAUSE DESPITE THE CONTRARY POSITIONS OF VICTORY CARRIERS AND OF RED STACK

O world! world! world! thus is the poor agent despised.

Troilus and Cressida, Act V, Scene 10, Line 36

Qui facit per alium facit per se

Victory Carriers contends that States Marine was not authorized to bind it to a pilotage clause. Red Stack (Br. 3-4) as amicus Victory Carriers states a similar position. States Marine affirms its analysis (Appellant's Opening Brief pp. 25-31) of each of the cases which has dealt with the question of a time charterer's authority to bind the vessel owner to a pilotage clause and confirms the representation made in its opening brief that there has been no direct holding by any court as a necessary ground of decision that a time charterer lacks authority to bind a vessel owner to the terms of a pilotage clause usual in the port. The time charter establishes the authority of the time charterer to bind the vessel owner to a usual pilotage clause consistent with the owner's undertaking "to remain responsible for the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account."

Dated, July 2, 1959.

Respectfully submitted,

GRAHAM, JAMES & ROLPH,

FRANCIS L. TETREAULT,

Proctors for Appellant

States Marine Corporation of Delaware.

No. 16,104

United States Court of Appeals
For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
a corporation,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation, and
SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD., a corporation, Claimant of the
Tug Sea Scout,

Appellees,

and

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD.,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation,

Appellee.

PETITION FOR REHEARING

GRAHAM, JAMES & ROLPH,

FRANCIS L. TETREAULT,

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FILED

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United States Court of Appeals For the Ninth Circuit

STATES MARINE CORPORATION OF DELAWARE,
a corporation,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation, and
SHIPOWNERS & MERCHANTS TOWBOAT Co.,
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Tug Sea Scout,

Appellees,

and

SHIPOWNERS & MERCHANTS TOWBOAT Co.,
LTD.,

Appellant,

vs.

VICTORY CARRIERS, INC., a corporation,

Appellee.

PETITION FOR REHEARING

*To the Honorable Clifton Mathews, Walter L. Pope and
Gilbert H. Jertberg, Judges of the Court of Appeals
for the Ninth Circuit:*

Appellant State Marine Corporation of Delaware hereby respectfully petitions for rehearing upon the Judgment of Affirmance entered herein October 22, 1959.

GROUND'S FOR THE PETITION

I.

EVEN IF BOUND BY A PILOTAGE CLAUSE VICTORY CARRIERS, INC. WOULD HAVE BEEN ENTITLED TO RECOVER FULL DAMAGES FROM RED STACK BECAUSE:

(a) The fault of the Red Stack pilot is not imputable to Victory Carriers.

This Honorable Court in its opinion of October 22, 1959, at page 11, expressed its view that "A shipowner bound by this pilotage clause, where the pilot was at fault, would hardly be in the position of the cargo owners in that case [The *Chattahoochee*, 173 U.S. 540], who were completely without either fault or control of any kind."

It is respectfully submitted that the Court erred in viewing the pilotage clause, if binding, as effective to impute to the shipowner any negligence of the Red Stack employee serving as pilot. Pilotage clauses are effective only as a release from liability for pilot negligence as held in *United States v. Nielson* (1955), 349 U.S. 129 and as recognized by this Honorable Court in its opinion of October 22, 1959 at pp. 10, 11.

Here there was no fault actual or imputable to Victory Carriers or the vessel; District Court Finding XII (Tr. 44-45):

"The collision and resulting damage were caused solely by the joint negligence of the pilot (Garner H. Long) and of the Mate of the SEA SCOUT as afore-said. All of Long's orders were promptly and efficiently obeyed by those on board the EMERY, and there was no fault on the part of the EMERY, her Master, officers or crew, nor can any fault be imputed to any of them under the circumstances of this case."

American courts have consistently expressed the view that the negligence of a towing company pilot engaged by a shipowner is not imputed to the shipowner. *The Cromwell* (1917) 243 Fed. 207 aff'd 4 Cir., 259 Fed. 166; *The Barendrecht* (2 Cir. 1925) 9 F. 2d 614; *The John D. Rockefeller* (4 Cir. 1921) 272 Fed. 67. See also *Griffin on Collision*, pp. 453-459. Although there is some conflict in American authority as to whether the negligence of a towing company pilot may be imputed to the vessel *in rem* (a question not presented by this case) the rule is settled that the negligence of an independent towing company pilot is not imputed to the shipowner.

The rule correctly stated on page 10 of the Court's opinion of October 22, 1959 that in mutual fault collision cases the mutual wrongdoers shall share the damages equally appears to have been erroneously carried forward by the Court and applied as between an innocent party, Victory Carriers, and a wrongdoer. The doctrine is well established in American law that where two vessels collide due to the fault of both, a damaged innocent third party may collect his full damages from a single wrongdoer, even if he has immunized one of the wrongdoers by contract. *The Chattahoochee* (1899) 173 U.S. 540; *Pennsylvania R. Co. v. The Beatrice* (1958) 161 F. Supp. 136.

Red Stack in its primary capacity as a towing company contracting the services of the tug SEA SCOUT is in precisely the same situation vis-a-vis fault-free Victory Carriers, assuming Victory Carriers bound by a pilotage clause, as were the shipowners vis-a-vis innocent cargo in *The Chattahoochee* (1899) 173 U.S. 540 and *The Esso Belgium/Nathanial Bacon* (1952) 343 U.S. 236. Like the

shipowners in those cases, in its capacity as a towing company Red Stack's contractual exemption from liability for pilot negligence cannot avail it to avoid payment of full damages for the loss to which its negligent performance of its towage contract contributed. *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85.

The fact that Victory Carriers, an innocent party injured in its property, was damaged by concurring negligent acts of two employees of Red Stack completes the analogy to the *Chattahoochee* situation in which the cargo had, by contract, released the negligent carrying vessel from liability. If, in the present case, Victory Carriers had released Red Stack from liability for pilot negligence, such release would have availed Red Stack no better in defending Victory Carriers' claim based on tug negligence than have such contractual exemptions from liability availed the carrier in hundreds of cases in which exempt perils and carrier's negligence have concurred to cause a single loss. *The Vallescura* (1934) 293 U.S. 296.

(b) The fault of the Red Stack tug in itself imposed upon Red Stack liability for full damages to Victory Carriers.

It is further respectfully submitted that the Court erred in treating as apposite those mutual fault collision cases in which there was no contractual relationship between the owners of the two vessels. Red Stack's towing contract, apart from the pilotage service, contained an implied contractual undertaking to indemnify Victory Carriers in full for damage resulting from negligent performance by the tug SEA SCOUT of Red Stack's towage contract. The principles of *Crumady v. The Fisser* (1959) 358 U.S. 423; *Royal Mail Lines v. Peck* (9 Cir. 1959) 269 F. 2d 857

should govern, under which Victory Carriers would be entitled to full indemnity for damage contributed to by tug negligence, absent some action on the part of Victory Carriers which would bar it from such indemnity, such as contributing negligence on the part of Victory Carriers' own employees, of which there was none.

II.

THE COURT ERRED IN RULING AGAINST STATES MARINE'S CONTENTION THAT IT WAS AUTHORIZED TO BIND VICTORY CARRIERS TO A PILOTAGE CLAUSE.

The Court erred in the holding expressed on page 8 of its opinion of October 22, 1959 reading "nor was there evidence that such clauses are either universally required, or even customary." The uncontradicted evidence is that Red Stack is the only company in the San Francisco Bay Area offering a docking service (tug and pilot) (Tr. 70), that all Red Stack invoices contained a pilotage clause (Tr. 68), and that Victory Carriers itself had on prior occasions used Red Stack tugs and paid Red Stack invoices containing a pilotage clause (Tr. 79). The discussion appearing on page 8 of the Court's opinion of October 22, 1959 indicates that the Court perhaps regarded States Marine's contention that it was authorized to bind Victory Carriers to a Red Stack pilotage clause as premised primarily on Clause 2 of the charter party. In fact, as the Court may have recognized, States Marine's contention was premised equally on Clause 26, i.e., that States Marine as time charterer was authorized by the owner to secure and provide tug service (Clause 2) on terms which would not be more onerous to the shipowner than its Clause 26 undertaking "to remain responsible for navigation, etc."

III.

**RED STACK'S CONDUCT BARS ITS CLAIM FOR
INDEMNITY AGAINST STATES MARINE.**

The general rule is that a party, such as Red Stack, seeking indemnity must exercise all reasonable good faith action to defend the original claim as to which indemnity is sought (and at least refrain from affirmatively seeking to have such liability imposed on it) failing which the putative indemnitor, States Marine, is discharged of liability. *American Surety Co. v. Ballman* (8 Cir. 1902) 115 Fed. 292 affirming 104 Fed. 634, cert. den. 187 U.S. 646. In the present case Red Stack has directed its efforts not to defend against the basic claim of pilot negligence, but on the contrary to achieve a holding that the collision resulted solely from pilot negligence (Tr. 11, 17 and Rep. Tr. 134 not printed). The impropriety of permitting indemnity in such circumstances is particularly patent in a case such as this where the party seeking indemnity, Red Stack, is the employer of the pilot upon whom the indemnitee has sought to cast sole blame for the collision.

Dated, San Francisco California,
November 16, 1959.

Respectfully submitted,

GRAHAM, JAMES & ROLPH,
FRANCIS L. TETREAULT,

*Proctors for Appellant and Petitioner
States Marine Corporation
of Delaware.*

CERTIFICATE OF COUNSEL.

I, Francis L. Tetreault, hereby certify that I am counsel for the appellant herein, that I prepared the foregoing Petition For Rehearing, that it is in my judgment well founded, and that it is not interposed for delay.

Dated, San Francisco, California,

November 16, 1959.

FRANCIS L. TETREAULT,

*Of Counsel for Appellant and
Petitioner States Marine Cor-
poration of Delaware.*

